St. George Tucker and the Limits of States' Rights Constitutionalism: Understanding the Federal Compact in the Early Republic

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This Article is a critical reevaluation of the conventional portrayal of St. George Tucker as an unyielding champion of states' rights constitutionalism and a jurist whose writings laid the basis for secession as the remedy for violations of the federal compact.¹ Such conventional wisdom rests on Tucker's unjustified reputation as "essentially an agrarian democrat who set his face against the rising capitalism's centralizing tendencies."² This Article, a revisionist challenge to the received wisdom, maintains that his thinking about the federal compact and the delegation of powers to the federal government was more complex and nuanced than the uses to which others put it decades later, and that dissolution of the Union—while theoretically available as a right of the states—was so disturbing to him as a practical matter that he made every effort to urge alternative constitutional remedies for abuses of federal authority. Writing at a time of economic and political crisis, Tucker envisioned an expanding republic of diverse sections reaching far to the west, bound together by mutual interests and commerce. These diverse

¹ See, e.g., H. Jefferson Powell, The Political Grammar of Early Constitutional Law, 71 N.C. L. Rev. 949, 994-95 (1993) (noting that a federal compact theory, such as Tucker's, "played an important and ultimately tragic role in future constitutional history as the justification for state defiance of federal authority, for state interference with federal activity, and for secession and civil war").

² Bernard Schwartz, Main Currents in American Legal Thought 170 (1993). Tucker, however, did agree that the common law should be used to promote economic activities. Id.
regions would be coordinated and controlled by a federal government whose enumerated authority related to the federative needs of commerce and the integration of regionally diverse economies. His outlook for the future was broader and more significant than the conventional portrayal of Tucker suggests. The need for the commercial integration of regions—North and South, East and West—as the basis for an effective union became embedded in a constitutionalism that granted extensive enumerated federal authority not only under the first five clauses of Article I, Section 8, but also under Article IV, Section 3 of the Constitution.

Such broad federal authority, cabined within the limits of commerce and expansion, may have been the exception that proved the more general rule of Tucker's strict constructionist states' rights philosophy, but it was such a significant exception that it forces us to reconsider his reputation. Given the impact of his edition of Blackstone's *Commentaries* as the only treatise on constitutional


4. [i] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; [ii] To borrow Money on the credit of the United States; [iii] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; [iv] To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; [v] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.

U.S. CONST. art. I, § 8, cls. 1-5.

5. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. CONST. art. IV, § 3.

6. ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF
law available in the United States until the 1820s, the views Tucker expounded in his law lectures and in his essays on Blackstone provide deep insight into the way the founding generation understood the theory and purpose of the federal compact. Moreover, in view of his status as "the first of the states' rights commentators upon the Constitution," the preferences he revealed in his substantive discussions of constitutional limitations are important as a guide to better understanding the meaning and limits of "states' rights" and the purpose of the federal compact in the early republic. Tucker, to be sure, never wavered in his belief that the federal government possessed only those powers delegated to it, and he bemoaned the "misconstruction" of the Constitution's Necessary and Proper Clause as a "pretext for an assumption of any power not specified in the constitution, on the part of the federal government." A focus on those statements alone, however, bequeaths to us an incomplete and oversimplified portrait of a complex, profound, and erudite constitutional thinker, well-versed in the contemporary Enlightenment writings of his time and committed to union. From Tucker's activities as a promoter of expansion; financial investor in western lands; professor of law; and author of pseudonymous publications not usually attributed to him or evaluated in examinations of his thinking, we find "some of the more attractive and healthier visions of what an American republic might have become," and not the nation that tore itself apart in bloody struggle four decades after his death.


7. On the profusion of such published treatises in the 1820s and 1830s, see G. EDWARD WHITE, 3-4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 95 (1988).


9. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").


11. Cover, supra note 8, at 1493.
A close reading of Tucker's discussions of Article I, Section 8 and Article IV, Section 3, reveals a commitment to union that belies the conventional portrait of Tucker. His simultaneous belief in the reserved powers of the states and in the necessity of a federal union capable of integrating the various interests of a regionally diverse nation requires terminology that is more nuanced than that of "secessionist" or "states' rights," and that conveys in their place a more complex constitutionalism. This Article argues that a more appropriate description of his constitutional ideas is "anti-consolidationist," a concept befitting Tucker's vision that the republic's success was based on the force of collective efforts among the various regions of the federal union, whether to empower it in its necessary functions or to restrain it from exceeding them. This Article also argues that a more accurate term than "secessionist" to describe Tucker's attitude toward federal-state disagreements over constitutional law would be "conciliationist," a term much more suited to Tucker's temperamental moderation and political commitment to the experiment of union. Such terms may be more cumbersome than those conventionally applied to Tucker, but they are necessary when the genesis of Tucker's views on the federal compact are examined in his own context. This Article therefore gives much attention to Tucker's own historical context by examining the totality of his writings, rather than wrenching his statements out of context and using them as decontextualized quotations for later political battles, and by locating him within a political community of similarly situated leaders who shared his


13. This term is borrowed from WHITE, supra note 7, at 126-27.

14. David C. Hendrickson applies this term to the Constitution's Framers who compromised on the divisive issues of commerce and slavery. DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 237 (2003). Hendrickson's "lost world" of diplomatic accommodation among the states is another well-chosen term that should remind us to avoid the interpretive temptation to polarize the Framers into two mutually exclusive and irreconcilable camps. See also William E. Nelson, Reason and Compromise in the Establishment of the Federal Constitution, 1787-1801, 44 WM. & MARY Q. 458, 460-66 (1987) (emphasizing that the Framers' drive for compromise "was not accidental[,] it was embedded in the very strictures of [their] politics").
goals, rather than among those who later applied his theories to changed circumstances. This is not to argue that the term "states' rights" does not apply to Tucker—only that the term's meaning to Tucker was more nuanced, qualified, and at times ambivalent, as he developed his complex constitutional principles in the two decades before 1803, in contrast to the simpler and more absolutist meaning given by the hard-liners of the generation that followed him.

I. ST. GEORGE TUCKER AND HIS TIMES: REPUBLICANISM AND ENLIGHTENMENT

This Article begins by distinguishing St. George Tucker from those commonly associated with him. Though a contemporary on the Virginia Court of Appeals with Spencer Roane, Tucker should not be confounded with his "antagonistic" rival. Tucker, after all, would later accept a federal judgeship, while Roane preferred to remain on Virginia's high court and oppose a federal supreme law of the land. Tucker also should be carefully distinguished from his brother, South Carolina Congressman Thomas Tudor Tucker, who tried unsuccessfully to retain the wording in the Articles of Confederation by inserting the word "expressly" into the Tenth Amendment's reservation of "powers not delegated to the United States by the Constitution."
Distinguishing St. George Tucker from the younger generation that surrounded him and misapplied his theories to a new and different set of issues is especially important. Tucker was a product of the eighteenth century, and like many others among the founding generation, he drew upon an Enlightenment tradition and a worldview that faded before their eyes in the first decades of the nineteenth century. Tucker, therefore, must not be bracketed with the younger generation around him, such as his notorious stepson John Randolph of Roanoke and Randolph’s friend John Taylor of Caroline. Tucker had a worldview different from these men and from his sons, Henry St. George Tucker, a judge and professor of law in Winchester, and Nathaniel Beverley Tucker, a professor of law at the College of William and Mary. The latter, usually referred to as “Beverley Tucker,” amply merits the title of “secessionist” and in fact produced a generation of such advocates at William and Mary, but his constitutionalism was a product of another historical era and should not be attributed to his father. According to one study, Beverley changed St. George Tucker’s law teachings in a way “that his father would have found curious, perhaps even perverted.” Abandoning his father’s commitment to the Union and Enlightenment moderation, Beverley used legal instruction as “a form of Christian education and a theater in which he could call for romantic action.”


19. On these distinctions, see Hamilton, supra note 18, at 106, and White, supra note 7, at 87.

20. See J. Randolph Tucker, Henry St. George Tucker, in Legal Education in Virginia, supra note 16, at 601, 607-09. Contrary to long-held belief, the “Tucker” who argued the case against federal judicial authority in Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 315-16 (1816), was most likely not St. George Tucker but rather his son Henry. David E. Engdahl, John Marshall’s “Jeffersonian” Concept of Judicial Review, 42 Duke L.J. 279, 301 n.64 (1992); see also White, supra note 7, at 166 n.44.


22. Id. at 651.

23. Id.
himself from Beverley’s teachings and cautioned him during the Nullification Crisis that he was going beyond what “we have been taught” about the Constitution. Above all, Tucker should not be viewed as an early version of John C. Calhoun or others of the Antebellum period whose use of Tucker’s writings removed him from his own context and injected his ideas into constitutional debates that Tucker never touched upon.

St. George Tucker’s impact on American law should be measured by the principles he devised for the success of a confederated republic on a national scale, as applied to the great problems the republic faced in the years between 1783 and 1803, and as he addressed them (perhaps vainly) to the rising generation of lawyers in his law lectures and his essays accompanying his edition of Blackstone.

This context is essential to understanding Tucker’s place in the growth of American constitutional theory. In the two decades after the Treaty of Paris, constitutional thinkers undertook the unprecedented task of creating a republican federal union amid extraordinary conditions that challenged their basic assumptions about confederated sovereignties and the compact that united them. How were they to deal with an expanding union, one that had to amalgamate new states beyond those existing prior to the creation of the federal republic in 1789? How were they to defeat the centrifugal forces of factionalism and localism and to break the cycle of failed confederacies of the past? How were they to adjust to commerce, a force of dubious morality in a largely agrarian republic, especially on a geographically sprawling continent? All of these questions were unprecedented, but within each of them lay embedded a more fundamental and remarkable dilemma, namely, that of balancing state and federal sovereignty after the Constitution’s ratification.

24. Id. at 650.

25. Robert Cover provided a more accurate assessment of Tucker when he wrote, “Tucker was an advocate of states’ rights, but within a principled framework very unlike the more extreme Carolineans that were to follow him.” Cover, supra note 8, at 1488. The distinction, Cover explained, was that “[i]t is in theory, not in substantive points, that Tucker properly belongs with the school of states’ rights proponents.” Id. at 1489. This Article owes much to and agrees with Cover’s distinction, but it also examines the theoretical distinctions.
So central was this problem to creating a federal union that it provided the framework for Tucker's law lectures at The College of William and Mary. Introducing his students to the subject, he explained:

The object of the present enquiry is how far the principles of that Constitution are consistent with the sovereignty & Independence of the States: & promotive of Harmony between them, individually, & the general Government in its collective capacity; with an examination of the limits which it assigns to their respective powers; and lastly, how far the Government arising from this Union & distribution of powers, and founded upon the principles of the federal Constitution, is conformable to the nature of a Democracy, and likely to secure or promote the happiness of the Citizen.\(^\text{26}\)

Importantly, Tucker realized the difficulties of achieving the proper constitutional balance within the federal compact, and eschewed simplistic solutions. In fact, after writing the above remarks to introduce his law lectures, he felt impelled to modify them by crossing out the word "simply" from the first sentence of his manuscript notes, which originally began, "[t]he object of the present enquiry is simply how far ...."\(^\text{27}\)

Tucker began grappling with this question well before he assumed the professorship vacated by George Wythe in 1790 at The College of William and Mary. By the time he published his edition of Blackstone's \textit{Commentaries} in 1803, Tucker had developed a body of principles based solidly on a compact theory of reserved state sovereignty and an expressly limited enumeration of federal authority. At the same time, however, Tucker remained a steadfast Unionist who conceived his constitutional beliefs within a framework of "scientific" reasoning required for the preservation of the federal union. Like many legal writers of his time, he was well read in the vast Enlightenment literature devoted to emerging concepts of the law of nations, whereby enacted rules among sovereign

\textsuperscript{26} St. George Tucker, Ten Notebooks of William and Mary Law Lectures, unnumbered page preceding page 1 (c. 1790) [hereinafter Tucker, Law Lectures] (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary).

\textsuperscript{27} Id. (emphasis added).
equals supplanted traditional, customary rules of international relations to such an extent that Jeremy Bentham coined the term “international law” to describe the positively enacted rules. 28 Within this literature, Tucker was especially drawn to the widely discussed issue of confederated sovereign states, and he responded with particular interest to Swiss writer Emmerich de Vattel’s popular treatise, The Law of Nations, which Tucker’s law teacher, George Wythe, had recommended. 29 In Vattel, Tucker found his working definition of “constitution” 30 and the principles underlying “all the modifications, restrictions, and ... changes necessary to be introduced into the affairs of nations” 31 by “positive law” within the received framework of natural law: namely, “that all these changes are deduced from the natural liberty of nations, from the interest of their common safety, the nature of their mutual correspondence, their reciprocal duties, and the distinctions of the internal and external, their perfect and imperfect laws.” 32

Tucker regarded this emerging field of law as a powerful model of guidance in the uncharted area of relations among the states, and between the states and the federal government. It provided a theoretical basis that was amply confirmed, he believed, by the historical realities of colonial development in North America, which had produced a union of sovereign states sharing a common


29. EMER DE VATTEIL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (London, Robinson et al., 1793) (translation of 1758 French original). Citations in this Article will refer to the 1793 London edition, which was available in Britain and the United States. Vattel’s influence on Tucker regarding commerce and union was as important and clear as Hume’s was on Madison regarding an extended republic, as demonstrated in the classic essay by Douglass Adair, “That Politics May Be Reduced to a Science”: David Hume, James Madison, and The Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343, 348-60 (1957).

30. Tucker, View of the Constitution, supra note 10, ed. app. at 16 (“The fundamental regulation that determines that manner in which the public authority is to be executed, is what forms the constitution of the state.” (quoting VATTEIL, supra note 29, bk. I, § 27)).

31. VATTEIL, supra note 29, at xii-xiii.

32. Id. at xiii, lvi. The basis on which sovereign states might confederate absorbed considerable attention in the eighteenth century. For Vattel’s location within this debate, see Andrew Hurrell, Vattel: Pluralism and Its Limits, in CLASSICAL THEORIES OF INTERNATIONAL RELATIONS, supra note 28, at 233, 246.
republican legacy but differing according to distinct regional identities and interests. Upon this union of interests, Tucker developed a political economy from which emerged a federal compact based on the reconciliation and coordination of interdependent regional economic growth, and on harmony rather than force and consolidation. Thus, to appreciate the St. George Tucker who republicanized and Americanized Sir William Blackstone, we must examine him as he observed his state and nation face independence and expansion, and as he struggled to devise an anticonsolidationist constitutionalism based on a sectional political economy consistent with his hopes for the Union.

II. THE FOUNDATIONS OF TUCKER'S COMPACT THEORY: HISTORY AND POLITICAL SCIENCE

To appreciate the development of St. George Tucker's compact theory, we must begin with his birth in Bermuda in 1752. Tucker, it must be remembered, was born in a region of the British Empire whose distinctiveness set it apart from the mainland no less than from the British Isles. Before beginning his legal studies in Virginia, he spent time in New York and Philadelphia, and after passing the bar, he spent the better part of 1774 visiting his brothers in South Carolina and cousins in New York. Before becoming a permanent resident of Virginia, therefore, he had traveled extensively in Britain's Atlantic colonies and at various times had considered settling elsewhere other than the Chesapeake. As a result, unlike many other mainland participants in the American Revolution, Tucker had an outsider's perspective on the peoples he joined in separating from Britain and establishing independent republics.

Tucker left the insular environs of Bermuda and entered the wider world of the British Atlantic when sharp and open conflict

33. See Cullen, supra note 16, at 657.
36. Id. Tucker briefly returned to Bermuda in 1775 when his father insisted that he abandon the mainland and reside on the island. Id. at 32.
with imperial authority was forcing the colonists to reconsider their relationship to the metropolis. As they tried to justify their departures from imperial law and define their rights against Parliament's interpretation of the imperial constitution, they sought support from among the many doctrinal tools available—natural law, common law, custom, and, ultimately, their own notion of what the imperial constitution ought to be. Common to all colonists, however, was a colonial legal self-awareness that emphasized the distinctiveness of the periphery. For the needs of challenging the sovereignty of the King-in-Parliament, this distinctiveness emphasized the common grievances of all the colonies represented at Philadelphia in 1776.

Colonial distinctiveness energized those resisting British authority by reviving a traditional basis of legitimacy and applying it to the modern world—the basis of law as the organic creation of society to suit its needs and give institutional form to social purposes agreed upon by the compact of the people. Awareness of colonial legal variety could not have escaped Tucker, whose need to grow professional roots led him to observe variations in the practice of law in the colonies he visited. British officials, charged with protecting imperial legal and commercial interests against colonial departures from the common law, expressed dismay at the various ways colonists had created "a strange sort of Proteus capable of putting on all shapes and figures as occasion requires." From the perspective of someone newly arrived in the colonies, it was apparent, as another frustrated official commented, "that throughout the whole continent of North America, there are not two colonies, where the courts of justice or the methods of proceedings are alike."

Many years later, John Adams confirmed this impress of colonial legal diversity by recalling the first meeting of the Continental Congress and the subsequent efforts at political union:

37. See id. at 14-18, 32-39.
38. See Greene, supra note 34, at 70-76; Hendrickson, supra note 14, at 70-73.
39. See Greene, supra note 34, at 103-04.
41. Id. at 484-85.
The colonies had grown up under constitutions of government so different, there was so great a variety of religions, they were composed of so many different nations, their customs, manners, and habits had so little resemblance, and their intercourse had been so rare, and their knowledge of each other so imperfect, that to unite them in the same principles in theory and the same system of action, was certainly a very difficult enterprise. The complete accomplishment of it, in so short a time and by such simple means, was perhaps a singular example in the history of mankind. Thirteen clocks were made to strike together—a perfection of mechanism, which no artist had ever before effected.  

In truth, having them agree was not as difficult as having "[t]hirteen clocks ... strike together," because the thirteen colonies had already naturally grouped themselves by region. No matter how different residents of the various colonial regions viewed themselves, the most noteworthy distinction made about legal diversity was between England and the colonies, and not among the colonies themselves.  

All this changed in 1776, and the awareness of differences accelerated in the 1780s. Colonial Americans were conscious of cultural and economic differences among the regions, to be sure, but the concept of regional blocs in American politics—and thus in law—came into sharpest relief when Americans recognized the lack of coherent governance under the Articles of Confederation and sought alternative bases for union. Following the Constitutional Convention of 1787 for example, George Mason was reported to have commented "that the Convention, generally speaking, was made up of block-heads from the northern, coxcombs from the southern, & office-seekers from the middle states." Many Anti-Federalists took  


for granted the cultural differences separating the regions and saw them as an insuperable barrier to such reform. The main divide, of course, was between North and South. Speaking as a Southerner, Joseph Taylor of North Carolina told the Hillsborough Convention, "[w]e see plainly that men who come from New England are different from us. They are ignorant of our situation; they do not know the state of our country. They cannot with safety legislate for us."\textsuperscript{45} When Richard Henry Lee wrote to George Mason that "the Commercial plunder of the South stimulates the rapacious Trader," Lee had no trouble identifying the villainous rapacious traders as northerners.\textsuperscript{46} Returning the favor in kind, Massachusetts Anti-Federalist James Winthrop, writing as "Agrippa," opposed ratification by warning against consolidation under one legal system and wrote "[i]t is impossible for one code of laws to suit Georgia and Massachusetts."\textsuperscript{47} Reaching for a well-worn stereotype, he explained, "[t]he inhabitants of warmer climates are more dissolute in their manners, and less industrious, than in the colder countries."\textsuperscript{48} Among Federalists, therefore, a general enhancement of a centralized government was not necessary to forestall the Union's disintegration into thirteen squabbling republics, but rather to prevent the creation of "three or four confederacies" emerging from the ruins of the Articles of Confederation.\textsuperscript{49}

Americans thus discovered the tradition of legal regionalism when the question of imperial constitutional structure was replaced by the new problem of defining legal relationships between the newly independent states.

[I]Independence brought questions of loyalty and allegiance to new levels of consciousness and contentiousness, encouraging Americans to redefine their rights and interests as citizens of


\textsuperscript{46} See Letter from Richard Henry Lee to George Mason (Oct. 4, 1787), in 1 The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification 45 (Bernard Bailyn ed., 1993) [hereinafter Debate on the Constitution].

\textsuperscript{47} Agrippa IV, The Despotism and Misery of a Uniform National State, MASS. GAZETTE, Dec. 4, 1787, reprinted in 1 Debate on the Constitution, supra note 46, at 448, 449.

\textsuperscript{48} Id.

\textsuperscript{49} The Federalist No. 5, at 25 (John Jay) (Jacob E. Cooke ed., 1961).
local communities, states, and the union as a whole.... [T]he
development of regional consciousness was predicated on
awareness of other regions in a competitive political context.\footnote{50}

The post-Revolutionary process of nation building created this
intensely competitive context and directed attention to examining
the distinctive regional patterns of law that had emerged under
British rule. St. George Tucker was no stranger to regional cultural
stereotypes, having witnessed them in his travels. He related his
experiences to Mathew Carey:

A New Englander supposes a Virginian or a South Carolinian,
an Aristocrat and a Tyrant, because he rides in a carriage and
has slaves to attend him, and to cultivate his lands. Those on the
contrary regard the inhabitants of New England as narrow
minded parsimonious adventurers, and speculators. The sober
industry of the one appears to the other to proceed from a sordid
mind, incapable of true enjoyment. The hospitality and plentiful
mode of living of the other, on the other hand is construed to be
the effect of voluptuousness and ostentation.\footnote{51}

Tucker's correspondence with Carey and other Northerners,
however, reveals that his conception of regionalism lacked the
resentment, rivalry, and outright bitterness of other Southerners.
Though proud of his Southern identity and protective of its particu-
lar institutions with the exception of slavery,\footnote{52} Tucker did not share
what an English traveler described as the "jealousy that exists
between separate states," nor did he enjoy anecdotal observation
that "turns into ridicule [of] their private customs."\footnote{53} Tucker’s close
friend John Page knew of his feelings when Page informed him in

\footnote{50} Edward L. Ayers & Peter S. Onuf, \textit{Introduction} to \textit{ALL OVER THE MAP: RETHINKING
AMERICAN REGIONS} 1, 8 (Edward L. Ayers et al. eds., 1996).
\footnote{51} CHARLES T. CULLEN, \textit{ST. GEORGE TUCKER AND LAW IN VIRGINIA 1772-1804}, at 153
to Mathew Carey (Oct. 8, 1795) (unpublished Tucker-Coleman Papers, located at the Earl
Gregg Swem Library at The College of William and Mary)).
\footnote{52} For discussions of St. George Tucker’s views on slavery and his plan to phase it out,
see Michael Kent Curtis, \textit{St. George Tucker and the Legacy of Slavery}, 47 WM. & MARY L. REV.
1157 (2006); Paul Finkelman, \textit{The Dragon St. George Could Not Slay: Tucker’s Plan to End
\footnote{53} S.W. Jackman, \textit{A Young Englishman Reports on the New Nation: Edward Thornton
1796, regretfully, that the same men who had once tried to get Virginians to hate New Englanders were now trying to generate animosity among Northerners toward Virginians. Tucker believed such feelings must be countered by personal contacts, correspondence, and exchanges of printed material, that is, "an intellectual dialogue with other regions within the country." Not only did Tucker exchange legal writing with Zephaniah Swift of Connecticut, but at the behest of Jeremy Belknap he became a corresponding member of the Massachusetts Historical Society. This goal of interregional cooperation would deeply inform and shape Tucker's constitutional ideas.

Tucker devoted a considerable portion of his first volume of *Blackstone* to contrasting the legal experiences of New England and Virginia, which he regarded as the two great poles of American law. Just as the "Massachusetts colony may be considered as the parent of the other colonies of New-England," Tucker believed that the principles and structures of Virginia law had spread through the South and had become the foundation of a regionally specific legal culture, with its own particular laws and institutions, including the most radical "departure from the principles of the common law ... in the establishment of slavery; a measure not to be reconciled either to the principles of the law of nature, nor even to the most arbitrary establishments in the English government at that period."

Tucker's historical understanding of American social, economic, and legal development revealed vastly differing patterns of regional autonomy over time that explained the profound variations between regional legal clusters, especially those of its two oldest settlements, Virginia and Massachusetts. In the second decade of the federal

56. Id. at 677-79.
57. St. George Tucker, *Of the Unwritten, or Common Law, of England; And It's Introduction into, and Authority Within, the United American States*, in 1 TUCKER, BLACKSTONE'S COMMENTARIES, supra note 6, ed. app. at 396 [hereinafter Tucker, *Authority of English Common Law*].
58. See id. ed. app. at 394-96.
59. Id. ed. app. at 388. The coalition between these two regions was a dominating event in this period. See HENDRICKSON, supra note 14, at 177.
republic, Tucker described their divergent historical paths in the context of a political rivalry between regions, not states. "Two ships sailing from the equator to the opposite poles would scarcely pursue more different courses, or arrive at more opposite points." He used the vastly differing patterns of regional autonomy over time to explain the profound variations between the two earliest, regional legal clusters. Drawing on history to explain legal variation, Tucker advanced a constitutional theory that served the political exigencies of the time and provided sharp insight into the meaning of states' rights theory in the early republic. An ardent Jeffersonian, Tucker presented a theoretical model and factual narrative to justify localist prescription beginning as soon as the first colonists arrived in North America. In fact, the colonists were part of a process that began much earlier, since "the common, or unwritten law must have been in a state of continual change, from the first institution of parliaments, in the thirteenth century, to the present time." Over the course of settlement, the colonists freely interpreted the unwritten law in different ways, producing "endless variety, and disagreement, between the civil institutions of the several colonies." Colonial statutory development accelerated the process. Pointing also to "the power which the legislatures of the several colonies were perpetually engaged in exercising, viz. that of making laws adapted to the views, principles, situation, and circumstances of their respective inhabitants and countries," Tucker observed that "the application of this rule in the several colonies will be found to have been as various as their respective soils, climates, and productions."

Tucker devoted much space contrasting Virginia and Massachusetts in his Blackstone because he suspected the New England colonies, a cadre of states, might combine to impose their will on the structure of national government. The divergent legal paths of these two regions, he pointed out, began with the contrasting "motives

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60. Tucker, Authority of English Common Law, supra note 57, ed. app. at 403.
61. See id. ed. app. at 386-94.
62. See id.
63. Id. ed. app. at 387.
64. Id. ed. app. at 391.
65. Id. ed. app. at 392.
66. Id. ed. app. at 393.
and intentions of the colonists, in their respective migrations," and continued with the "local circumstances" that magnified their differences and led each region to assume an identity defining itself sharply in contrast with the other.67 This process, which Ayers and Onuf called "reciprocal definition,"68 John Adams called the "damnable Rivalry between Virginia[] and Massachusetts."69 For Tucker, it illustrated an inescapable historical and constitutional reality: namely, that "as two strait lines, which diverge from each other at the same point, can never after meet, or become parallel, so the institutions of two countries, founded upon such discordant principles, could never after be assimilated to each other."70 Anyone seeking to understand American constitutional development, therefore, "must again abandon all hope of satisfaction from any general theory, and resort to their several charters, provincial establishments, legislative codes, and civil histories, for information."71 Tucker's repudiation of "any general theory" referred, of course, to his rejection of the common law as a basis for a general system of laws for the federal republic. He had a powerfully compelling reason to include this argument in his edition of Blackstone, with its corollary insistence upon regional variation: his abiding suspicion of a consolidated national government with broad common law jurisdiction in its courts. As he warned in his essay about claims of federal common law jurisdiction,

If it be true that the common law of England, has been adopted by the United States in their national, or federal capacity, the jurisdiction of the federal courts must be co-extensive with it; or, in other words, unlimited: so also, must be the jurisdiction, and authority of the other branches of the federal government;

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67. Id. ed. app. at 388, 391.
68. Ayers & Onuf, supra note 50, at 9.
70. Tucker, Authority of English Common Law, supra note 57, ed. app. at 391.
71. Id. ed. app. at 393.
that is to say, their powers respectively must be, likewise, unlimited.\textsuperscript{72}

As a potential wedge of complete consolidation, a federal common law had far wider and more dangerous implications.

Though he eschewed any "general theory" of law applicable to the states' internal affairs, Tucker eagerly sought general—indeed, scientific—principles upon which a union of sovereign states might be built, a process that exemplified "how the formation of the United States as a federal union expressed Enlightenment impulses toward doctrinal rationalization more fully than any contemporaneous developments in Europe."\textsuperscript{73} G. Edward White is surely correct, then, by identifying in Tucker a serious theoretical commitment to a federal union based on "scientific" principles of government, along with other jurists who did not necessarily agree with his conclusions:

Tucker, [David] Hoffman, and [Joseph] Story all believed that juristic commentary should be scientific, by which they meant that it should emphasize the systematic derivation and application of general principles in order to make law more intelligible, predictable, and in harmony with both the axioms of republicanism and the demands of a market economy.\textsuperscript{74}

For Tucker, the ""study of law, as a science,' was necessary 'to a full and perfect understanding' of republican principles."\textsuperscript{75}

By reading Vattel, Tucker found the principles necessary to preserve republicanism in Virginia and to reconcile state sovereignty with a theory of a confederated republic. Vattel's work resonated among American readers, and particularly to a Virginian such as Tucker, because of its shared assumptions about society and

\textsuperscript{72} \textit{Id.} ed. app. at 380. G. Edward White, also citing this passage, labels Tucker's understanding of such jurisdiction as the ""coterminous power question" and convincingly shows it to be the foundation of Tucker's and Jefferson's suspicions. WHITE, \textit{supra} note 7, at 123-24.

\textsuperscript{73} PETER S. ONUF \& NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814, at 3 (1993).

\textsuperscript{74} WHITE, \textit{supra} note 7, at 94.

\textsuperscript{75} \textit{Id.} at 83 (quoting St. George Tucker, \textit{Preface} to 1 TUCKER, BLACKSTONE'S COMMENTARIES, \textit{supra} note 6, at xvii).
the obligations of government. In terms certain to find approval in Jeffersonian Virginia, Vattel wrote,

[o]f all the arts, tillage, or agriculture, is doubtless the most useful and necessary. It is the nursing father of the state. The cultivation of the earth causes it to produce an infinite encrease; it forms the surest resource, and the most solid funds of riches and commerce, for the people who enjoy an happy climate.\textsuperscript{76}

Humanity had an obligation, in fact, to cultivate the soil, and Vattel endorsed the basic justification the English used to dispossess the Native American peoples, as “none but erratic nations, incapable, by the smallness of their numbers, to people the whole” of the continent.\textsuperscript{77} Like so many republican revolutionaries, Vattel also railed against the “corruption of manners, a love of luxury, effeminacy, [and] the rage of licentious passions” and celebrated the “military virtue of its citizens.”\textsuperscript{78} Government was established to effect these goals. Citing Vattel and nearly quoting him verbatim, Tucker wrote:

The objects of political laws, are, as stated by a writer of Eminence, first, to provide for the necessities of the nation. To encourage Labour & Industry, to provide necessary workmen, to promote agriculture, to advance Commerce, to establish an easy Communication between the different parts of the state, [and] to regulate the rates of money ....\textsuperscript{79}

But it was in his formulation of relations among confederated sovereignties that Vattel articulated what Virginia opponents of consolidation wanted to read. Vattel provided them with the proper formula by which

several sovereign and independent states may unite themselves together by a perpetual confederacy, without each in particular ceasing to be a perfect state. They will form together a federal
republic: the deliberations in common will offer no violence to
the sovereignty of each member, though they may, in certain
respects, put some constraint on the exercise of it, in virtue of
voluntary engagements.\footnote{80} Vattel wrote for a Europe of competing—indeed, warring—
sovereignties, and not for the confederated, compound republic that
emerged from the Articles of Confederation. His goal was to end the
warfare that plagued European nations in their quest to conquer
and impose their rule on their neighbors. But his ideas about
relations among sovereign states were especially attractive to
Americans, and it is no surprise that Tucker relied heavily on them
and cited them often. Vattel was concerned with the historical fact
that large despotisms had been able to overwhelm small republics,
and he argued that republics could only survive by confederating to
create a strong counterbalance of powers to resist such subjection.
Vattel observed, "[c]onfederacies would be a sure way of preserving
the equilibrium, and supporting the liberty of nations."\footnote{81} He asked
if "all princes thoroughly [understood] their true interests."\footnote{82}
Unfortunately, they failed to recognize their "true interests" and
instead were "[d]azzled by the luster of a present advantage,
seduced by their avarice, [and] deceived by wicked ministers."\footnote{83}

According to Vattel, sovereignties might unite by dividing the
\textit{functions} of sovereignty rather than sovereignty itself; that is, they
divided government and agreed upon laws that applied to the
different demands of governing.\footnote{84} Tucker cited with approval
Montesquieu's model that

\begin{quote}
\hspace{1cm}a kind of Constitution by which the internal advantages of a
republic, might be united with the external force of a monarchial
Government, by which he means a confederate republic,
which he describes to be a Convention of small States to form a
\end{quote}


\footnote{81. \textit{Vattel}, \textit{supra} note 29, bk. III, § 49.}

\footnote{82. \textit{Id.}}

\footnote{83. \textit{Id.}}

\footnote{84. \textit{Id.} Preliminaries, § 27. Vattel used "mutual commerce" as an example, \textit{id.} bk. II, § 21.}
large one, by which association they arrive to such a Degree of power as to be able to provide for the Security of the whole united Body. 85

Once again turning to Vattel, Tucker explained,

[t]he Institutions of all governments have regard to two distinct objects—Their connexions and Intercourse with foreign States—and the Administration of the government among their own Citizens.—The former constitutes one of the objects of the political,—the latter, of the civil, Laws of the State. 86

Tucker immediately clarified the nature of those "political" powers delegated to the federal government as a response to the crisis of the 1780s, when the nation lacked any ability to pay its debts, make treaties, or advance its commerce. 87 By abolishing the Confederation and "[b]y the establishment of this Constitution, without any Dependence on any foreign power," he wrote, "Virginia became an independent & sovereign state." 88 Nevertheless, it had been an act of "the people [who] thought proper to annul" the Confederation. 89 Tucker thus made a crucial distinction about the division of sovereignty between the states and the "new form of government" 90 the Constitution created. He explained, "[i]n so doing [the people] resumed the sovereign power into their own hands, and the adoption of the Constitution of the United States was another instance of the immediate exercise of the sovereign power by the people in their collective and individual capacity." 91 The people conferred obligations and powers on the federal government, but only those expressly delegated. "In this act," Tucker conceded, "there is no express reservation of the Right of sovereignty to the state," but the Tenth Amendment (to which he repeatedly referred to as the "Twelfth," following the convention of citing them in the order originally proposed to Congress) reserved to the states and to the

86. Id. at 4 (citing Vattel in the margin).
87. Id. at 4-5.
88. Id. at 3.
89. Id.
90. Id.
91. Id. at 4.
people "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States."

III. THE POLITICAL ECONOMY OF TUCKER'S FEDERAL COMPACT

To understand which powers had been delegated to the federal government, and more importantly their extent, Tucker's understanding of the purpose of the federal compact and its obligations must be examined. The clear need for commercial and financial reform, he believed, had "conspired to render the grant of this power more easily obtained than almost any other contained in the new Const[itution]." Tucker approvingly wrote, "[a] candid review of this power of the federal government [over commerce and finance] can not fail to excite our just applause of the principles upon which it is founded." The "principles" Tucker espoused were drawn heavily from his own experience and reading of political economy and state theory, especially Vattel's writings.

In his essay Of the Several Forms of Government, Tucker drew upon Locke, Paine, Rousseau, and Vattel to assert that societies are formed because people have "common interests, and ought to act in concert." Accordingly, "it is necessary that there should be established a public authority, to order and direct what ought to be done, by each, in relation to the end of the association." By 1786, the government under the Articles of Confederation clearly had failed to respond to a "total derangement of commerce, as well as of the finances of the United States." The need to consider "how far an uniform system in the commercial regulations may be necessary to their common interests, and their permanent harmony," led to a meeting of interested states at the Annapolis Convention in September 1786. Tucker attended as one of Virginia's three commissioners, along with Edmund Randolph and James Madison,

92. Id.
93. Id. at 100.
94. Id.
95. St. George Tucker, Of the Several Forms of Government, in 1 TUCKER, BLACKSTONE'S COMMENTARIES, supra note 6, ed. app. at 7 [hereinafter Tucker, Several Forms of Government].
96. Id.
97. Tucker, View of the Constitution, supra note 10, ed. app. at 159.
98. Id.
who praised Tucker as "sensible, federal and skilled in Commerce." Tucker, however, did not attend the Philadelphia Convention that drafted the Constitution, nor the Richmond Convention that resulted in Virginia's ratification of it, but he felt confident telling his law students that commercial reform "seems to have been the first Object of the new Constitution—no doubt there were many others of a secondary nature." Tucker and his colleagues represented a widespread concern in Virginia over the economic prospects of an agrarian commonwealth unable to take part in the broader marketplace. Only a month before the Annapolis Convention, Virginia delegates to Congress had urged support for a report proposing major reforms to "render the federal government adequate to the ends for which it was instituted." Among them were reforms for tax collection, granting Congress the "sole and exclusive power of regulating the trade of the States as well with foreign Nations as with each other," and the creation of "a federal Judicial Court" with jurisdiction over "any regulations that may hereafter be made by Congress relative to trade and Commerce, or the Collection of federal Revenues pursuant to powers that shall be vested in that body." Federal protection and advancement of commerce united political leaders who were otherwise reluctant to support the new Constitution when submitted for ratification. Edmund Pendleton addressed the Virginia ratifying convention in Richmond with an appeal to core values:

101. For discussion of the movement toward granting greater powers for commercial reform to a national government, and its impact on constitutional thinking from the 1780s through the 1810s, see Lance Banning, Political Economy and the Creation of the Federal Republic, in DEVISING LIBERTY: PRESERVING AND CREATING FREEDOM IN THE NEW AMERICAN REPUBLIC 11-49 (David Thomas Konig ed., 1995).
103. Id. at 495-98.
I wish, sir, for a regular government, in order to secure and protect those honest citizens who have been distinguished—I mean the industrious farmer and planter.... I wish commerce to be fully protected and encouraged, that the people may have an opportunity of disposing of their crops at market, and of procuring such supplies as they may be in want of. I presume that there can be no political happiness, unless industry be cherished and protected, and property secured.... The idea of the poor becoming rich by assiduity is not mere fancy.... I have often known persons, commencing in life without any other stock but industry and economy, by the mere efforts of these, rise to opulence and wealth. This could not have been the case without a government to protect their industry.\textsuperscript{104}

Supporting ratification, Pendleton therefore spoke in favor of those elements necessary to produce the kind of government needed—a reform that yielded, in 1789, the creation of an independent federal judiciary, the granting of significant taxing authority, and the exclusive regulation of interstate commerce.\textsuperscript{105} Tucker's commitment to commerce is a neglected but vital aspect of his ideas; it shaped his thinking about the role of government and the relations among the states and regions, and was the foundation of his unionism. His fortunes in the depleted lands of Tidewater offered little hope for his future and the future of the family he cared so dearly about. His "dread" of impoverishment drove him to augment his finances by resuming his county court law practice in 1782, as he began the process of gradually reinventing himself from the life of a rural lawyer-planter to that of an urban lawyer immersed in financial enterprise.\textsuperscript{106} Like many other Virginians, he looked to the West as hope for the survival of an agrarian society, but he recognized that agriculture without capital and commerce was hopeless. "In the country below the mountains in Virginia," he wrote in his \textit{Blackstone}, "very little of the best land remains to be

\textsuperscript{104} Remarks of Edmond Pendleton, Virginia Ratifying Convention, in 3 STATE RATIFICATION DEBATES, supra note 45, at 293, 295.

\textsuperscript{105} Id. at 299-303, 305. Pendleton's reservations concerned the grant of what he regarded as dangerous powers to the executive. Id. at 297.

\textsuperscript{106} ON the impact that this shift in priorities had on his views of slavery, see Curtis, supra note 52, Finkelman, supra note 52, and Phillip Hamilton, Revolutionary Principles and Family Loyalties: Slavery's Transformation in the St. George Tucker Household of Early National Virginia, 55 WM. & MARY Q. 531, 537-39 (1998).
cleared, and the far greater part of them have been cultivated, without improvement, till they are not more productive than fresh lands of far inferior quality.”107 To the West lay vast tracts of land, “[b]ut vast tracts of unsettled land are of little more value than the parchment which conveys them. ... Population first creates a value in land; without that, it is of less value than the waters of the Ocean; these at least serve for an high way.”108 Potential settlers had no way of moving west or of shipping their goods east. Worse yet, “exorbitant usury” made settlement impossible, and existing credit arrangements benefited only speculators. “Very few land-jobbers have had any other object in view than selling their lands in the gross, to some dupe, or other speculator.”109

Such views, read in isolation and with no awareness of his action on them, might naturally contribute to the conventional view of Tucker as an anticapitalist agrarian. But his perception of Virginia’s economic plight did not turn Tucker into an embittered agrarian like John Taylor of Caroline.110 To the contrary, he became an advocate of low interest rates and development practices that would finance the expansion of farming and the construction of internal improvements to provide a market for its products.111 Vattel provided powerful arguments to support such views, which are echoed strikingly in Tucker’s work. Government, Vattel had written, “ought not to allow either communities or private persons to acquire large tracts of land in order to leave it uncultivated.”112 Such abuses of property rights, he insisted, “are contrary to the welfare of the state, and ought to be suppressed, or reduced to just bounds.”113 Commerce demanded a supply of money, and the states were obligated “to have a quantity of it coined sufficient to answer the necessities of the country, and to take care that it be good, that is, that its intrinsic value bears a just proportion to its extrinsic or

107. St. George Tucker, Concerning Usury, in 3 TUCKER, BLACKSTONE’S COMMENTARIES, supra note 6, ed. app. at 104.
108. Id. ed. app. at 105 (omission in original).
109. Id.
111. HAMILTON, supra note 18, at 80.
112. VATTEL, supra note 29, bk. I, § 78.
113. Id.
numerary value."\textsuperscript{114} He continued, "[s]ince the state is surety for the goodness of the money and its currency, the public authority alone has the right of coining it," as well as the obligation to support "the business of the bankers."\textsuperscript{116} Altogether, "it is equally the interest and the duty of every nation to establish among themselves wise and equitable laws of commerce."\textsuperscript{118}

Tucker took these ideas seriously because they reflected his own life and the experiences of his neighbors, and were confirmed by his reading of Vattel, who stressed the importance of "high-ways, bridges, canals, and, in a word, of all safe and commodious ways of communication."\textsuperscript{117} When Tucker relocated to Williamsburg and assumed the chair of law and police at The College of William and Mary, he steadily sold off his land and used the proceeds to invest in financing ventures in the West, such as the James River Canal Company, in which he bought shares in 1803.\textsuperscript{118} But he put the major part of his investments into newly chartered banks; by the 1790s he was the largest stockholder in the Bank of Alexandria.\textsuperscript{119} Tucker was especially supportive of the commonwealth’s banks by purchasing large blocks of their initial stock offerings. When the Bank of Virginia opened in 1804, he purchased a large holding of stock to get it established securely and persuaded almost one hundred other investors to back this newly opened bank, which was financing east-west commerce.\textsuperscript{120} The next year he managed to enlist another sixty-nine Williamsburg investors to buy its stock.\textsuperscript{121} He also bought shares in the Farmer's Bank of Virginia when it opened in 1809 and in the Second Bank of the United States when it was rechartered in 1816.\textsuperscript{122} He probably even invested in the First Bank of the United States in the 1790s, despite his reservations

\textsuperscript{114} \textit{Id.} bk. I, § 106.
\textsuperscript{115} \textit{Id.} bk. I, §§ 107, 109.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} bk. I, § 100.
\textsuperscript{118} See HAMILTON, supra note 18, at 108. Tucker was never able to disengage from plantation agriculture and the slave system that supported it, in part because of the large holdings legally bound to his second wife. By the early nineteenth century the family had "made its peace with slavery." Hamilton, supra note 106, at 543-44; see also HAMILTON, supra note 18, at 80-84.
\textsuperscript{119} HAMILTON, supra note 18, at 108.
\textsuperscript{120} \textit{Id.} at 108-09.
\textsuperscript{121} \textit{Id.} at 226 n.27.
\textsuperscript{122} \textit{Id.} at 109.
about its constitutionality. In any case, his reputation now had become such that one friend lumped him together with "stock jobbing Folks," who were transforming the nation.\textsuperscript{123}

Tucker's political economy rested on the union of interests that must be cultivated to assure the nation's survival. He elaborated on this in a book he wrote in response to a British order-in-council limiting American vessels in the West Indies trade.\textsuperscript{124} Tucker, writing as "Columbus," took the long-term view of the political economist by stressing "the remote consequences of national revolutions," whose "secret springs are in motion from their commencement."\textsuperscript{125} It was the patriot's obligation to "benefit his country by the discovery" of such forces.\textsuperscript{126} With approval, Vattel had cited Parliament's trade and navigation acts as the "most distinguished" example of the "great advantages" achieved to "effectually protect the navigation of the merchants, and favour by considerable gratifications, the exportation of superfluous commodities and merchandise."\textsuperscript{127} Tucker had to agree, grudgingly, though he reminded his readers of Britain's diplomatic hostility and quoted a British Cabinet member remarking on Britain's commercial efforts to "undermine and ruin" the United States.\textsuperscript{128} Not unlike Madison, Tucker shared the nationalist conviction that the federated states must possess the force to protect American trade in two vital ways: sufficient naval power to guarantee the security of American shipping, and diplomatic leverage to form trade alliances with other

\begin{footnotes}
\item\textsuperscript{123} Id. He also urged others to support banking by writing \textit{A Short and Candid View of the Operations and Affects of the Bank of Virginia}. Id. at 226 n.27. Tucker's support of banks was fortified by his reading of Montesquieu, who saw them as necessary to underwrite commerce and prevent depopulation. Banks, moreover, served to provide the necessary capital for weakening the control that states had over their peoples. \textit{See} ANNE M. COHLER, MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM 122-29 (1988) (discussing the connection between banks, commerce, population, and government).
\item\textsuperscript{124} ST. GEORGE TUCKER, REFLECTIONS ON THE POLICY AND NECESSITY OF ENCOURAGING THE COMMERCE OF THE CITIZENS OF THE UNITED STATES OF AMERICA (New York, Loudon reprint 1786) (1785) \textit{[hereinafter TUCKER, REFLECTIONS]}.
\item\textsuperscript{125} Id. at 3; \textit{see also} Clyde N. Wilson, \textit{Foreword} to ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES: WITH SELECTED WRITINGS, at x (1999) (indicating that Tucker authored the pseudonymous pamphlet).
\item\textsuperscript{126} TUCKER, REFLECTIONS, supra note 124, at 3. Tucker was employing the eighteenth-century meaning of "discovery" as "uncovering."
\item\textsuperscript{127} VATTEL, supra note 29, bk. I, § 87.
\item\textsuperscript{128} \textit{See} TUCKER, REFLECTIONS, supra note 124, at 7-8.
\end{footnotes}
nations as counterweights to British commercial might.\textsuperscript{129} It was thus imperative, Tucker argued, that the new republic somehow exert the naval force necessary to protect American interests and to coordinate its commercial policy to join with other nations not aligned with Britain and establish reciprocal trade relationships.\textsuperscript{130} Tucker's principle of "reciprocal conduct" lay at the base of the new order Vattel espoused and would capitalize on America's timber products for shipbuilding, maritime fleet for fishing, soil for saleable crops, and rivers to bring those crops to its ports.\textsuperscript{131}

Tucker's political economy required changes in the federal structure if the nation was to be able to compete and survive. This was scarcely a parochial vision for Virginia or the South; his vision of mutually beneficial regional economies was clear when he summed up his political economy: "Upon this principle the first object of America should be to encourage ship-building."\textsuperscript{132} Enacting a common system of protective tariffs would also be necessary.\textsuperscript{133} Only a stronger confederation could do this, but its benefits would be shared by all. "The governing principle in all measures of this nature should be to encourage and advance commerce among our actual citizens, and enable them to trade upon equal terms, at least, with foreigners."\textsuperscript{134} He reiterated the importance of the common good involved: "For we should bear in mind one thing on which the prosperity of our country depends. It is this great truth, \textit{That the gains of our own citizens augment and increase the common stock, while the gains of the British merchant impoverish America, and enrich her natural enemy."}\textsuperscript{135} Tucker admitted many Americans regarded "commerce as a bane," but urged that such "early prejudices" must be rejected in the new world of the marketplace.\textsuperscript{136} "The only means by which nations can rise into consequence, are, by their arms, or by their commerce."\textsuperscript{137} His political economy, like Vattel's

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 9.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} Vattel referred to "the general obligation incumbent on nations reciprocally to cultivate commerce." \textit{Vattel, supra} note 29, bk. II, § 21.
\item \textsuperscript{132} \textit{Tucker, Reflections, supra} note 124, at 11.
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.} at 12.
\item \textsuperscript{135} \textit{Id.} at 13.
\item \textsuperscript{136} \textit{Id.} at 14.
\item \textsuperscript{137} \textit{Id.}
\end{itemize}
and others of the Enlightenment, sought to create a balance of economic powers; for the United States, such power could be achieved only through a recognition by the various states of their mutual economic interest and the acceptance of the political reform necessary to advance it.

Tucker stood with those who realized that such economic reform required a political union capable of crafting and enforcing it. He wrote at a time of economic crisis, not only his own, or for Virginia, but for the entire nation. Calls for greater congressional control over commerce began as early as 1782 but were ignored as state after state enacted protective tariffs against each other. Nevertheless, pressure continued to build as producers of the state’s agricultural products became painfully aware that they needed naval protection in the Atlantic, protective trade measures against the discriminatory trade policies of Britain and other trading rivals, and coordinated domestic promotion of agriculture. Recognizing the link between economic and political survival, the *Virginia Gazette* applauded the meeting of representatives from Maryland and Virginia at Alexandria in November 1784 to deliberate and consult on the vast great political and commercial object, the rendering navigable the Potowmack River from tide water .... This is perhaps a work of more political than commercial consequence, as it will be one of the grandest chains for preserving the Federal Union. The western world will have free access to us and we shall be one and the same people whatever system of European politics may be adopted.

In linking politics and economics, this correspondent was giving voice to a widespread awareness of the need for political reform. Spanish blockage of the Mississippi, along with predatory British navigation acts, had precipitated a sharp depression and led many Virginians to confront the need to achieve better control over, and

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139. See Banning, supra note 101, at 23-29 (describing the country's economic difficulties in the 1780s).

promotion of trade. Writing from Paris, Jefferson responded with approval when told of

some recommendations to the states to vest Congress with so much power over their commerce as will enable them to retaliate on any nation who may wish to grasp it on unequal terms; and to enable them if it should be found expedient to pass something like the British navigation act."'\(^{141}\)

Charles Pinckney stated the matter bluntly to Benjamin Guerard:

It is so clear that these States can only derive consequence & power from an attention to agriculture & commerce that the necessity of a regulating power somewhere must be obvious to every one who has considered the subject—it is plain also that this power can be placed only in Congress ....\(^{142}\)

Writing to Jefferson, James Monroe, the most vocal advocate of federal commercial authority, was aware of the ramifications of "the absolute investment of the U.S. with the controul of commerce," and conceded that the "importance of the subject and the deep and radical change it will create in the bond of the union, together with the conviction that something must be done, seems to create an aversion or rather a fear of action on it."\(^{143}\) Indeed, four months later Richard Henry Lee would warn that sectional differences were too great to entrust

powers absolute for the restraint & regulation of Commerce in a Body of represen[tatives] whose Constituents are very differently circumstanced. Intrigue and coalition among the No[rthern] Staple States, taking advantage of the disunion & inattention of the South, might fix a ruinous Monopoly upon the trade & productions of the Staple States that have not Ships or Seamen for the exportation of their valuable productions. You know Sir that the Spirit of Commerce is a spirit of Avarice, and

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143. Letter from James Monroe to Thomas Jefferson (June 16, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON, supra note 141, at 215.
that when ever the power is given the will certainly follows to monopolize, to engross, and take every possible advantage.\textsuperscript{144}

Lee's fears were widely held in the new republic, and generated an ultimately unsuccessful effort to require a two-thirds majority for any navigation act.\textsuperscript{145} Of more significance, however, is that despite the radical nature of vesting the regulation of commerce in Congress, many Virginians, such as Monroe, Madison, and Tucker, were willing to accept it.

Jefferson shared the general sense of crisis and agreed that extensive federal control of commerce was necessary. Writing to George Washington from Annapolis, where the Congress was "wasting our time and labour in vain efforts to do business," especially in the crucial area of trade reform, he reported, "I suppose the crippled state of Congress is not new to you.\textsuperscript{146}"

Describing the failure to seize on trade opportunities offered by westward expansion, Jefferson noted:

\begin{quote}
All the world is becoming commercial. [If it [were] practicable to keep our new empire separated from them[,] we might indulge ourselves in speculating whether commerce contributes to the happiness of mankind. But we cannot separate ourselves from them. Our citizens have had too full a taste of the comforts furnished by the arts and manufactures to be debarred the use of them. We must then in our own defence endeavor to share as large a portion as we can of this modern source of wealth and power.\textsuperscript{147}
\end{quote}

Jefferson's experiences with Congress led him to conclusions about cooperation among the states that are usually overlooked. In a letter to James Madison written while sitting with Congress in Annapolis, Jefferson shared his belief that a rising, young Virginia politician

\begin{footnotes}
\item[144] Letter from Richard Henry Lee to Unknown (Oct. 10, 1785), in 22 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, supra note 142, at 676-77.
\item[145] See HENDRICKSON, supra note 14, at 236-37.
\item[146] Letter from Thomas Jefferson to George Washington (Mar. 15, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON, supra note 141, at 25.
\item[147] Id. at 26.
\end{footnotes}
would benefit from service in national office. "I see the best effects produced by sending our young statesmen here," he observed.\textsuperscript{148}

They see the affairs of the Confederacy from a high ground; they learn the importance of the Union and befriend federal measures when they return. Those who never come here, see our affairs insulated, pursue a system of jealousy and self interest, and distract the Union as much as they can.\textsuperscript{149}

In his correspondence with other Virginians about commerce, Jefferson made clear that his vision of the West would require cooperation among the regions to prevent the worsening of destructive and expensive competition. By 1784, Spain had closed the lower Mississippi and laid claim to the Southwest, and state protective tariffs threatened to make competition for the West a life or death matter.\textsuperscript{150} Already, Jefferson noted, Pennsylvania was investing in public works to connect it with the West,\textsuperscript{151} and New York was soon to follow, producing "a rivalship between the Hudson and Patowmac for the residue of the commerce of all the country Westward of L[ake] Erie, on the waters of the lakes, of the Ohio and upper parts of the Missisipi."\textsuperscript{152} Although Virginia had great natural advantages over its potential rivals, entering such a contest by constructing its own system of public works would involve "immense expence."\textsuperscript{153} Commercial rivalry over the West threatened to worsen an already harmful situation, and Jefferson saw federal control as necessary to prevent it.\textsuperscript{154} Hoping to preserve as much state sovereignty as possible, he therefore insisted that such powers be narrowly confined, and he was not yet willing to extend such blanket authority to Congress. The powers granted to the federal government, he believed, should be clearly enumerated and implemented in treaties establishing a defined supremacy over ordinary legisla-

\begin{footnotes}
\footnote{148. Letter from Thomas Jefferson to James Madison (Feb. 20, 1784), in \textit{6 THE PAPERS OF THOMAS JEFFERSON, supra note 141, at 544, 548-49.}}
\footnote{149. Id. at 549.}
\footnote{150. Matson & Onuf, \textit{supra} note 138, at 46; Onuf & Onuf, \textit{supra} note 73, at 95.}
\footnote{151. Letter from Thomas Jefferson to James Madison, \textit{supra} note 148, at 548.}
\footnote{152. Letter from Thomas Jefferson to George Washington, \textit{supra} note 146, at 26.}
\footnote{153. Id. at 25.}
\footnote{154. For more discussion on regional competition for control of the West, see McCoy, \textit{supra} note 3, at 248-50, 255-58.}
\end{footnotes}
tion, until further reform of the confederation could be achieved. As he explained to Monroe,

[y]ou see that my primary object in the formation of treaties is to take the commerce of the states out of the hands of the states, and to place it under the superintendance of Congress, so far as the imperfect provisions of our constitution will admit, and until the states shall by new compact make them more perfect.\textsuperscript{155}

Once ratified, such authority would be cabined by its narrow application to matters related to its subject, the regulation of trade and commerce, but in that jurisdiction it would stand supreme: “The moment these treaties are concluded the jurisdiction of Congress over the commerce of the states springs into existence, and that of the particular states is superseded so far as the articles of the treaty may have taken up the subject.”\textsuperscript{156} Congress, Jefferson agreed, must have extensive regulatory powers: other than not allowing the states to impose nonreciprocal duties against “foreigners” or to bar the import or export of particular items, “Congress may by treaty establish any system of commerce they please.”\textsuperscript{157} As a model of constitutional grant and limitation, Jefferson’s treaty idea would resonate with Tucker’s thinking about the enumerated powers of Article I.

Jefferson’s hope for treaties, however, was as vain as hope for any agreement required by the Articles. “The subject of commercial embarrassments is exhausted. Congress have no powers,” wrote a discouraged Rufus King to Daniel Kilham.\textsuperscript{158} “Unless the several States vest powers in congress to regulate commerce, or will themselves agree in some uniform Measures, no treaty can ever be expected—the reasoning of the British upon this subject is so obvious that I will not state it to you. But enough,” he concluded.\textsuperscript{159}

\textsuperscript{155.} Letter from Thomas Jefferson to James Monroe (June 17, 1785), in \textit{8 THE PAPERS OF THOMAS JEFFERSON}, supra note 141, at 227, 231.

\textsuperscript{156.} Id. at 230.


\textsuperscript{158.} Letter from Rufus King to Daniel Kilham (Oct. 12, 1785), in \textit{22 LETTERS OF DELEGATES TO CONGRESS}, supra note 142, at 679, 680.

\textsuperscript{159.} Id.
Disintegration of the Union seemed imminent, but not into a chaos of thirteen states. Few Americans, if any, either feared or desired such an outcome. Rather, the more prevalent fear was that three confederacies would emerge. "These confederacies," wrote Benjamin Rush of such predictions, "they say will be united by nature, by interest, and by manners, and consequently they will be safe, agreeable, and durable." This was, of course, the conventional paradigm suggested by writers such as Vattel. At the head of each, it was expected, one of the larger states would assume dominance and lead the confederacy according to the economic contours needed for survival. From Massachusetts came the call for New England to form its own "new and stronger union," while a Virginian wrote to James Madison, "[t]he doctrine of three Confederacies, or great Republics, has it's [sic] advocates here," presumably with the Old Dominion at its head.

The Confederation's palpable weaknesses were epitomized by its empty treasury, left dry by Congress's inability to tax and the refusal of the states to honor its requisitions. Ignoring these requests, many states called instead for selling the lands of the trans-Appalachian West, recently ceded to Congress after years of rivalry between states with western land claims and those without them. The call to sell the newly created common patrimony, however, provoked immediate and sharp opposition. From one point of view, such a policy challenged a claimed natural right of emigration and exceeded congressional authority. Typical of this defiance was a statement made by an Ohioan in 1785:

I do certify that all mankind, agreeable to every constitution formed in America, have an undoubted right to pass into every vacant country, and there to form their constitution, and that Congress is not empowered to forbid them, neither is Congress

160. MATSON & ONUF, supra note 138, at 83-84 (quoting Letter from Benjamin Rush to Richard Price (Oct. 27, 1786), in 1 THE LETTERS OF BENJAMIN RUSH 408-10 (Lyman Butterfield et al. eds., 1951)).
161. Id. at 85 (quoting INDEP. CHRON. (Boston), Feb. 15, 1787, in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 100, at 57, 57).
162. Id. at 86 (quoting Letter from James McClurg to James Madison (Aug. 5, 1787), in 10 THE PAPERS OF JAMES MADISON, supra note 99, at 134, 135).
163. See Banning, supra note 101, at 35-36.
empowered ... to make any sale of the uninhabited lands to pay the public debts.\footnote{164}

This brand of unregulated expansion, however, prompted opposition to selling western lands from a different quarter, one that recoiled in horror at a force that threatened to speed the Confederation's disintegration. This opposition, to be sure, had its own parochial interests: opening the West would drain the populations of coastal states. But its centrifugal force worried them even more. In his letter to James Monroe praising the idea of greater congressional regulation of trade, Jefferson advised that the time to give Congress such power was now, "before the admission of the western states," which would seek to block such a plan before it could be enacted.\footnote{165} Informed that the states were pressuring Congress to divide federal lands among the states and let them take the proceeds of sale at vendue, he reacted unequivocally:

\begin{quote}
I am very differently affected towards the new plan of opening our land office by dividing the lands among the states and selling them at vendue. It separates still more the interest of the states which ought to be made joint in every possible instance in order to cultivate the idea of our being one nation, and to multiply the instances in which the people shall look up to Congress as their head. And when the states get their portions they will either fool them away, or make a job of it to serve individuals.\footnote{166}
\end{quote}

From Paris, Jefferson had identified a fear felt more acutely by Americans back home, for whom the prospect of a mad land rush was a nightmare of disunion. Tucker agreed, but added another reason. Western land sales, he feared, would generate revenues that might finance a dangerously powerful federal government "formidable to the liberties of the people."\footnote{167} Even so, he did not wish to see that income going to the states. The cession of the western

\footnotesize
\begin{itemize}
\item 164. Alan Taylor, \textit{Land and Liberty on the Post-Revolutionary Frontier}, in \textit{DEVISING LIBERTY}, supra note 101, at 81, 89 (omissions in original).
\item 165. Letter from Thomas Jefferson to James Monroe, supra note 155, at 229.
\item 166. \textit{Id}.
\end{itemize}
territories had been "for the common benefit of the union," and federal revenue from the public domain was a "necessary, though perhaps dangerous power," which as a constitutional and policy matter belonged to the federal government.

The refusal of Congress to yield on this point pleased both Tucker and Jefferson, but the demand for cheap sales of western lands only intensified after the Constitution's ratification. In 1795, therefore, Tucker took the pen name "Columbus" and published his *Cautionary Hints to Congress Respecting the Sale of the Western Lands, Belonging to the United States.* This pamphlet was long attributed to James Madison, but the fact of Tucker's authorship forces us to recognize his deep involvement with, and sympathy for, the constitutional bonds of union.

Tucker rested his argument on the stated assumption that the Constitution gave the federal government control over "territory out of the jurisdiction of any state." Continuing the arguments made by Jefferson and other opponents of open land sales in the West, he called that policy "a horrid waste of national wealth" and "an improvident waste" that "I propose to guard against." Like James Monroe, who had emphasized the benefits of western development to the entire nation, and especially to the southern states, Tucker maintained that the West was "to be considered not only as a fund of actual wealth, to the United States, but of population and strength to the Union." He saw that fund tapped in the future, because the present U.S. population was not adequate to settle that land properly and in sufficient density to contribute to the national wealth, and migration westward would only depopulate those areas thriving at present. Tucker was candid enough to admit that cheap western land would depress the value of land in the east, but he

170. ST. GEORGE TUCKER, *CAUTIONARY HINTS TO CONGRESS RESPECTING THE SALE OF THE WESTERN LANDS, BELONGING TO THE UNITED STATES* (Philadelphia, Lang & Ustick 2d ed. 1796) [hereinafter TUCKER, CAUTIONARY HINTS].
171. See Wilson, *supra* note 125, at x (indicating that Tucker authored the pseudonymous pamphlet).
172. TUCKER, CAUTIONARY HINTS, *supra* note 170, at 1.
173. *Id.* at 5-6.
175. TUCKER, CAUTIONARY HINTS, *supra* note 170, at 5.
argued that such an effect would harm all the nation and produce a net loss.\textsuperscript{176} To allow migration in a more controlled manner, by contrast, would enable commerce to develop, because "experience proves ... that population, agriculture, and commerce minister to each other."\textsuperscript{177}

Tucker's vision of the West as a unifying force illustrates his anti-consolidationist constitutionalism and parallels James Madison's own position on the value of the West as integrating a common national interest. In fact, in his famous 1791 essay attacking "Consolidation" in Philip Freneau's \textit{National Gazette}, Madison explained the positive and negative meanings of that term: "If a consolidation of the states into one government be an event so justly to be avoided, it is not less to be desired, on the other hand, that a consolidation should prevail in their interests and affections."\textsuperscript{178} The common interest of the nation, he went on, was best served by a clear demarcation between state and federal sovereignty: "Let the former continue to watch against every encroachment, which might lead to a gradual consolidation of the states into one government. Let the latter employ their utmost zeal, by eradicating local prejudices and mistaken rivalships, to consolidate the affairs of the states into one harmonious interest ...."\textsuperscript{179} Worthy of note is the salient though overlooked fact that just two weeks earlier Madison had written another essay for Freneau's paper entitled \textit{Population and Emigration}, in which he set out a defense of westward emigration as one such "harmonious interest." Answering the common refrain about northeastern depopulation, he countered,

[i]nstead of lamenting then a loss of three human beings to Connecticut, Rhode Island, or New Jersey, the \textit{Philanthropist}, will rejoice that \textit{five} will be gained to New York, Vermont, or...

\textsuperscript{176} Id. at 7-8.
\textsuperscript{177} Id. at 8. Tucker's experiments in inventing a telegraphic device, which he tested between the old capitol building and the college in Williamsburg, were possibly related to his desire for integrating the far-flung regions of the nation. These experiments are described in the \textit{VA. GAZETTE \& GEN. ADVERTISER}, Jan. 24, 1794.
\textsuperscript{179} Id.
Kentucky; and the patriot will be not less pleased that two will be added to the citizens of the United States.\textsuperscript{180}

Madison's mention of New York is noteworthy, for he saw the northern frontier as a lucrative expanse of real estate and an integral territorial part of the Union. In 1786, in fact, he had made extensive purchases of land there.\textsuperscript{181}

For Tucker, it was both the constitutional right and the policy obligation of the federal government to encourage and control expansion, not only through shaping the governments and laws of the new states but through controlling settlement by barring it from certain areas or by setting land prices. Vattel made clear a country's jurisdiction included the right to establish laws or, if it wished, to prevent individuals from appropriating uncultivated land.\textsuperscript{182} Vattel's point served Tucker's vision of a federal government that could guarantee the survival of republicanism in an expanding union. Tucker had no constitutional qualms about the power of the Confederation or the federal government under the Constitution to dictate the internal structure of new states, because these territories had not been constituted as states "antecedent" to the supervising authority granted by the Articles.\textsuperscript{183} As early as 1779, before cession of those lands to Congress, George Mason drafted a resolution for the Virginia Assembly condemning any attempt by Congress to assert jurisdiction. "Should congress assume a jurisdiction," it stated, such an act would "subvert the sovereignty and government of any one or more of the United States, and establish in congress a power which in process of time must degenerate into an intolerable despotism."\textsuperscript{184} But the formal cession by the states changed the constitutional relationship, and the Northwest


\textsuperscript{181} See 2 \textit{BRANT}, supra note 17, at 339-41.

\textsuperscript{182} \textit{VATTEL}, supra note 29, bk. II, § 84.

\textsuperscript{183} See Tucker, \textit{View of the Constitution}, supra note 10, ed. app. at 150-51 (discussing states' "antecedent" rights).

Ordinance granted extensive congressional authority which, Tucker averred, was confirmed by Article VI of the Constitution.¹⁸⁵

Like Jefferson, Tucker sought the destruction of the ancien regime of the law, and he criticized those remnants that he saw remaining in the member states. Like Madison, who turned west in part because of his "wishes ... to depend as little as possible on the labour of slaves,"¹⁸⁶ Tucker viewed the region as providing the foundation for a new republican order.¹⁸⁷ He urged the abolition of primogeniture and entail in those states that continued them, such as New York, for which he recommended the "division and subdivision of those manors, or landgravates, which now confer upon their owners an influence, so incompatible with a true republican government."¹⁸⁸ This system, he warned, was a "latent poison which threatens to convulse, if not destroy it."¹⁸⁹ Tucker might only recommend such a plan for New York, but he believed that Congress could impose it on new states: "And if Congress have power to establish these regulations in the western territory of the United States, (of which I see not much reason to doubt,) they ought to constitute a part of the fundamental laws of that country, whenever it shall be settled."¹⁹⁰

The question of federal authority over territories began even before the Articles were ratified, continued with the federal Constitution, and was resolved only by the Civil War. It remained controversial because it concerned a power that some believed was not expressly delegated and was exercised only as an implied power—a position that Tucker rejected. Nevertheless, it was recognized that rival claims to western lands stood as "obstacles which disturb the harmony of the Union,"¹⁹¹ and states with claims eventually ceded them voluntarily to Congress. This cession of lands to Congress and the creation of a national domain in 1784, and then

¹⁸⁵. See Tucker, View of the Constitution, supra note 10, ed. app. at 280.
¹⁸⁶. Letter from James Madison to Edmund Randolph (July 26, 1785), in 8 THE PAPERS OF JAMES MADISON, supra note 99, at 327, 328.
¹⁸⁷. His views on the future of the West thus differed markedly from those of his son, Beverley, who emigrated to Missouri in 1815 in hopes of recreating the past and becoming the "founder of a new dynasty" rooted in expanding slave society. For St. George's skepticism, see HAMILTON, supra note 18, at 120-21, 183-97.
¹⁸⁸. TUCKER, CAUTIONARY HINTS, supra note 170, at 11.
¹⁸⁹. Id.
¹⁹⁰. Id. Tucker reasserted this right at the end of the pamphlet. Id. at 13.
the express grant of authority in the federal Constitution in 1789 rendered the matter moot,¹⁹² but the question would emerge again with the purchase of the Louisiana Territory in 1803.

IV. COMMERCE, THE FEDERAL COMPACT, AND THE AUTHORITY OF CONGRESS

Did Congress have the authority to purchase, control, and amalgamate Louisiana? Was this newly acquired territory included in the wording of Article IV, or had that delegated power been granted to Congress only for territory already in the Union? Thomas Jefferson had his doubts about federal authority. He had, of course, accepted congressional authority over the Northwest Territory under the Articles, for he had drafted the Ordinance of 1784 that organized it.¹⁹³ Even so, when Governor of the Northwest Territory Arthur St. Clair exercised police power authority and issued orders concerning local affairs, Jefferson rebuked him for issuing orders that “amount in fact to laws, and as such could only flow from it’s [sic] regular legislature.”¹⁹⁴ He rejected them, therefore, as “powers not authorized by the laws.”¹⁹⁵

Tucker harbored no such doubts, a fact that makes his unreserved acquiescence in an implied federal jurisdiction over the newly added domain noteworthy. Such a position makes perfect sense within his overall concept of the division of state and federal authority. American sectionalism was now not only a matter of North and South, but also of East and West, and the same forces that he identified as necessary to preserve a union of the old sections now applied with even greater urgency to a new reality with a greater number of discrete but interdependent regions. Tucker was keenly aware of the purchase's importance to the Union's survival in its present form. For this reason he described the purchase as “the most momentous object which has been

¹⁹². U.S. Const. art. IV, § 3, cl. 2.
¹⁹³. The Ordinance of 1784 (Apr. 23, 1784), reprinted in 6 The Papers of Thomas Jefferson, supra note 141, at 613-16; see also id. at 600-13 (containing proposed drafts and committee reports).
¹⁹⁵. Id.
achieved on the part of the United States since the final establish-
ment of their independence by the treaty of peace with Great
Britain in 1783, with the single exception of the adoption of the
present constitution of the United States.” Tucker made this point
in a pamphlet under the pseudonym “Sylvestris.” Although any
new state created out of newly acquired territory would not be
antecedent to the United States, and thus Congress could dictate its
internal structure once the state joined the Union, it would assume
its sovereign powers and retain them like all existing states. Only
by acknowledging such sovereignty could the federal government
co-opt secessionist impulses and gain a freely granted adherence to
the Union’s legitimately delegated and acknowledged powers. As
Peter Onuf explains,

if state rights and sovereignty were secured, it would be possible
to entrust Congress with larger powers, even in such ambiguous
areas as commerce and taxation where it was much less certain
what state rights or powers were or should be. The vindication
and guarantee of state rights had to precede the enlargement of
congressional powers.

Tucker made full use of his financial experience to describe the
fiscal benefits of the accession, noting that “the most experienced
financier in the land-jobbing business would be obliged to acknowl-
edge it to have been a lucky hit.” Tucker’s main thrust, though, concerned the positive impact the
West would have on the Union’s survival. Arguing from Vattel, he
explained that the purchase prevented the Europeanization and
degeneration of North America into war by insulating the United

196. ST. GEORGE TUCKER, REFLECTIONS ON THE CESSION OF LOUISIANA TO THE UNITED STATES 13 (Wash., D.C., Smith 1803) [hereinafter TUCKER, CESSION OF LOUISIANA].
197. Id.; see also Wilson, supra note 125, at x (indicating that Tucker authored the pseudonymous pamphlet).
198. Tucker acknowledged that French citizens would “be incorporated with the United States, as soon as can, consistently with the constitution of the United States, ... and in the mean time are to be secured in their liberties, property, and religion.” TUCKER, CESSION OF LOUISIANA, supra note 196, at 8.
199. PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787, at 76 (1983); see also id. at 75-102 (recounting the conflicts leading to the cession of western lands to the Continental Congress).
200. TUCKER, CESSION OF LOUISIANA, supra note 196, at 8.
States from the militarily menacing despotisms that had encroached on its borders before.\textsuperscript{201} France's continued presence, for example, would have eventually frightened "our western brethren" and involved "the whole confederacy in a war with one of the most powerful nations in Europe."\textsuperscript{202} Had France formed its own confederacy, allied due to the "similarity of situation in respect to their commerce," the "flourishing colony" would have enabled France to "seduce the people of the western states into an opinion that a more advantageous alliance, or confederacy could be formed with" the French rather than American government.\textsuperscript{203} Tucker warned that some people were still hoping for such a "western confederacy."\textsuperscript{204} Fortunately for the United States, "we have obtained for the western states and their commerce, a strong and, in effect, an impassable barrier against invasion, or annoyance from the west, or south."\textsuperscript{205} Just as Vattel showed how the Roman Empire had kept frontier lands vacant "as a rampart" against its enemies,\textsuperscript{206} Tucker envisioned the expanse of the trans-Mississippi West as a barrier against its own dangerous rivals. He suggested enticing existing settlers back east of the river, and populating the new territory with convicts and freed slaves.\textsuperscript{207} 

Crucial to the Union's survival was \textit{republicanized} expansion, in which institutions protected within the sovereignty of its constituent parts would assure republican government for all states. Tucker identified two reasons explaining why rapid settlement of the trans-Mississippi West would destroy republicanism.\textsuperscript{208} First, unchecked migration would produce a population too sparse to sustain republican institutions. To illustrate his point, he praised

\begin{itemize}
\item \textsuperscript{201} \textit{Id.} at 5.
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.} at 14-15.
\item \textsuperscript{204} \textit{Id.} at 15.
\item \textsuperscript{205} \textit{Id.} at 12.
\item \textsuperscript{206} \textit{Vattel, supra} note 29, bk. II, § 86.
\item \textsuperscript{207} \textit{Tucker, Cession of Louisiana, supra} note 196, at 25-26.
\item \textsuperscript{208} We cannot dismiss his own self-interest: Tucker, like all Virginians investing in the territories east of the river, stood to lose when cheap land depressed the value of his investments. Nevertheless, he implored his readers to be impartial by limiting his remarks "to those sober and reflecting persons, who, without any view to their own personal emolument, or that of their friends and connexions, examine the measures of government impartially, as they tend to promote, and to secure the general happiness of the confederacy." \textit{Id.} at 10.
\end{itemize}
New England settlement patterns and drew an invidious comparison with thinly populated Virginia and North Carolina:

In the former, barren spots are made productive, whilst in the latter vast tracts of arable lands lie wholly waste and uncultivated; and five miles square in the first, can often produce as many hardy militia for the defence of their country, as five and twenty miles square can furnish in the latter.\[209\]

Second, cheap land would attract unrepublicanized Europeans, "a measure, which [he] apprehend[ed] would be attended with most pernicious effects, both immediate and consequential."\[210\] The combination of a depopulated East and a thinly populated or Europeanized West, he feared, might "at first weaken, and then dissolve our present happy federal union, and finally subvert and destroy the happiness of this western world."\[211\] Alternatively, the lure of Mexico with "its golden mines" would arouse "the same cupidty" that had attracted Spanish colonization and "would probably produce a dissolution of the Union, and probably change the type and character of our government."\[212\]

The trans-Appalachian West, if properly controlled by a federal government with the necessary powers, would guarantee "the preservation of the Union, among the present states, for a period far beyond that which it would probably have lasted if Louisiana had been retained and settled by France."\[213\] Tucker provided a unionist political economy of harmonized regional interests:

Our whole country, except the ports on the Atlantic, and at the mouth of the Mississippi, will consist of an extensive and numerous agricultural people, detached from all the other civilized nations of the globe, forming one general and powerful confederacy of republican states, nursed in the lap of liberty, sprung from one common stock, cherishing the same fraternal sentiments towards each other, and the same devotion to their common country, liberty and happiness. The demon of discord is

\[209\] Id. at 21.
\[210\] Id. at 18.
\[211\] Id. at 17.
\[212\] Id. at 23.
\[213\] Id. at 14.
the only enemy from whose effects or malignity the United States could have just cause of apprehension ....

Tucker's project thus looked confidently to a unionist but anti-consolidationist future, protected by the constitutional mechanisms of the Constitution, the reservation of state sovereignty, and the necessary enumerated authority of the federal government to regulate commerce in the interests of the whole. He had no doubt of the federal government's authority to do so, even asserting that it must and could bar the settlement of the Louisiana Territory to keep the "demon of discord ... chained for centuries, beyond the Mississippi ...."215

Tucker repeatedly emphasized that the federal compact reserved state sovereignty, and this Article's purpose is neither to argue otherwise nor deny the vast chasm between Tucker's constitutional principles and those of his critics, such as Joseph Story. However, one purpose of this Article is to argue that despite his belief in reserved state authority, Tucker regarded the federal government's power to regulate commerce as broad, and as "necessary" to that enumerated function. Echoing Vattel, Tucker argued that in ratifying the Constitution the people of the United States had "distributed the government, or administrative authority of the [individual] state" to the federal government in "external" matters and to the states in "internal" matters.216 He explained that this was necessary by drawing on another stock-in-trade of the Enlightenment, the progressively complex nature of civilization through history by which "the machine of government becomes necessarily more complex in its parts, in proportion as its functions are multiplied."217

V. An Authority "Necessary Though Perhaps Dangerous"

Tucker had no doubt that the purchase of Louisiana was authorized by Article IV and was "necessary" to further constitutional goals. Identifying the powers "necessary" to achieve the federal

214. Id. at 25.

215. Id.

216. Tucker, Several Forms of Government, supra note 95, ed. app. at 10.

217. St. George Tucker, Preface to 1 TUCKER, BLACKSTONE'S COMMENTARIES, supra note 6, at xvi.
government's enumerated powers posed intractable difficulties for a confederated republic whose authority was not inherent but delegated. What was necessary might be simultaneously "necessary, though perhaps dangerous," requiring constant vigilance and control.\textsuperscript{218} Tucker once again referred to Vattel on "the necessities of the nation," among whose "first objects of a good government" he included the need "[t]o encourage labor and industry, ... to promote agriculture, to advance commerce, [and] to establish an easy communication between the different parts of the state."\textsuperscript{219}

Directly addressing the general problem of such powers as delegated by Article I, Section 8, he believed that "the line of separation between the jurisdictions of the federal and state governments ... is however a broad line, extending like the ecliptic, sometimes on one side, and sometimes on the other, of our political equator."\textsuperscript{220} Examining these powers "more minutely," he classified them into four groups:

I. Those exclusively granted to the federal government.

II. Those in which the state has unquestionably concurrent, though perhaps subordinate powers with the federal government.

III. Those where the concurrent authority of the state government is questionable; or controllable by congress.

IV. Those reserved to the states, exclusively.\textsuperscript{221}

Tucker's method of locating governmental powers on either side "of our political equator" once again drew on Vattel, whose "rules of interpretation" for "expressions capable of an extensive and confined sense"\textsuperscript{222} corresponded to Tucker's opinion on strict or loose construction. In discussing the Tenth Amendment's limitation on federal authority to expressly enumerated powers, he explained that

\begin{itemize}
  \item \textsuperscript{218} Tucker, Law Lectures, supra note 26, at 132; supra text accompanying note 92.
  \item \textsuperscript{219} Tucker, View of the Constitution, supra note 10, ed. app. at 178. In addition to Vattel, Tucker relied on Montesquieu several times in his Blackstone for the principle that trade—whatever its effect on the morals of a particular society—softens hostilities among states, promotes peace, and helps prevent any depopulation that might occur otherwise. Id. passim.
  \item \textsuperscript{220} Id. ed. app. at 179.
  \item \textsuperscript{221} Id. ed. app. at 179-80.
  \item \textsuperscript{222} VATTEL, supra note 29, bk. II, §§ 262, 299.
\end{itemize}
it follows, as a regular consequence, that every power which concerns the right of the citizen, must be construed strictly, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution.  

For Vattel, how to construe a grant of power as "extensive" or "confined" depended on whether it was classified as "odious," "favourable," or of a "mixed" nature—three categories corresponding to the recognizable constitutional division of "enumerated," "reserved," or "concurrent." Among powers "odious," and thus requiring a strict construction, were penal statutes and statutes that arrogated something not yielded or tending "to change the present state of things." Vattel's long disquisition on these categories dealt mainly with international treaties, but his general framework provided a template for Tucker. For example, Tucker's fervid opposition to the Alien and Sedition Acts is a notable example of defining a matter as "odious," as is his insistence on reserving to the states all "antecedent" rights.

Vattel's first rule of "favourable things" meriting extensive interpretation, by contrast, is that the power granted is "every thing that tends to the common advantage in conventions, or that has a tendency to place the contracting powers on an equality, is favourable." These "favourable" grants correspond to the Union's federative function in promoting commerce and a sound economy. Tucker praised Hamilton's Federalist No. 9 without knowing its author's identity, but, he guessed, "[t]his idea of a confederate, or federal, republic, was probably borrowed from Montesquieu, who treats of it as an expedient for extending the sphere of popular government, and reconciling internal freedom with external  

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223. Tucker, View of the Constitution, supra note 10, ed. app. at 308.
225. Id. bk. II, §§ 292-310.
226. See id.
227. See Tucker, Several Forms of Government, supra note 95, ed. app. at 14-29.
228. See Tucker, View of the Constitution, supra note 10, ed. app. at 151.
229. Vattel, supra note 29, bk. II, § 301. Tucker cites this chapter of Vattel, see Tucker, View of the Constitution, supra note 10, ed. app. at 151, in his description of the creation of an "original compact" in 1787.
security.”

He decried the confederation’s requirement of unanimity for navigation acts, which were needed to retaliate against British commercial warfare. “[S]o cautious were [the states] at that time, in their concessions of power to the federal government” that one state could veto an act benefiting the whole. It made no difference that “[t]his measure, which, if it had been adopted would have operated to the exclusive benefit of the navigating states,” because that region’s contribution was essential to the economic survival of all the states. Rhode Island was not alone in its “ill timed jealousy”; however, it was merely one example of the harmful “commercial rivalship” of the sort that also divided Virginia and Maryland and led to the Annapolis Convention in 1786.

Ending this “rivalship” necessitated extensive and exclusive congressional authority to regulate commerce and to lay duties and imposts. “So unreasonable an advantage ought not to prevail among members of the same confederacy,” he wrote of various state duties and discriminations, “and ... the repetition of such exertions could scarcely fail to lay the foundation of irreconcilable jealousies, and animosities among the states.” Vattel wrote, a “general obligation incumbent on nations reciprocally to cultivate commerce” existed. Trade duties, of the sort appearing in the confederation with increasing frequency in the 1780s, were thus “oppressive to commerce, [and] are blameable, unless founded on very important reasons arising from the public good.” In Congress’s exclusive power over interstate commerce, Tucker recognized the capacity to promote each state’s interests through the good of the whole, and singled out this authority as a particular part of the system against which fears of consolidation must be rejected:

A candid review of this part of the federal constitution, cannot fail to excite our just applause of the principles upon which it is founded. All the arguments against it appear to have been

231. Id. ed. app. at 244.
232. Id. ed. app. at 244-45.
233. Id.
234. Id. ed app. at 249.
236. Id. bk. II, § 23.
drawn from the inexpediency of establishing such a form of government, rather than from any defect in this part of the system, admitting that a general government was necessary to the happiness and prosperity of the states, individually.\textsuperscript{237}

Tucker wrestled with the concept of "necessary" and struggled to oppose the exercise of powers that many Federalists inferred from the grant of congressional power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government or the United States, or in any Department or Officer thereof."\textsuperscript{238} Importantly, Tucker did not argue, as a more extreme states' rights advocate warned, that this grant could be combined with the General Welfare Clause to create a power that "directly annihilates all the powers of the state legislatures."\textsuperscript{239} The distinction is crucial because it places Tucker in the context of his times and at the proper location on the spectrum of states' rights philosophy. It also reveals his trouble accommodating the genuine needs of the "general welfare" while acknowledging the danger of consolidation from legislation deemed "necessary and proper."

Tucker discussed the Necessary and Proper Clause and Congress's powers in a portion of his essay entitled \textit{View of the Constitution of the United States}.\textsuperscript{240} By the time he published it, he had lost some of his earlier confidence about restraint in the enactment of "necessary and proper" laws as promised in \textit{The Federalist} and criticized several specific acts that tended "to destroy the effect of the particular enumeration of powers."\textsuperscript{241} He explained the meaning of the clause:

\begin{itemize}
\item 238. U.S. CONST. art. I, § 8, cl. 18.
\item 241. Id. ed. app. at 287. He named the national bank, presidential appointment of militia officers, exclusion of unstamped paper "as evidence in a state court," and the Alien and Sedition Acts. Id.
\end{itemize}
The plain import of this clause is, that congress shall have all the incidental or instrumental powers, necessary and proper for carrying into execution all the express powers .... It neither enlarges any power specifically granted, nor is it a grant of new powers to congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted, are included in the grant.

It is important to understand how Tucker came to this position. Blackstone is not the only place he discussed the clause; his other discussions reveal a deeper inquiry and an examination of constitutional issues that go beyond any simple articulation of "states' rights" and "strict construction." Tucker informed his law students that this clause provoked many objections in state ratifying conventions, but he explained that "[c]andour however will readily admit, that far from containing anything dangerous, the true construction of this clause is favourable [to] the Liberties of the People, & to the Independence of the State Governments." Tucker drew on compact theory to explain that the clause was framed to make clear the powers of federal government were not inherent, but only enumerated: the clause "is calculated to restrain the federal Government from the exercise of such powers, as might otherwise have been supposed to flow from the mere act of establishing a Government."

That concept is vital to acknowledge because it is inseparable from another of his cardinal principles: the federal government has no general common law authority. This connection emerges after consideration of a pamphlet he published in 1800, before Blackstone, in which he took up the question of the common law. The pamphlet, entitled Examination of the Question, "How Far the Common Law of England Is the Law of the Federal Government of the United States?", has been largely overlooked in discussions of Tucker's constitutionalism, perhaps because it merely seems an

242. Id.
243. Tucker, Law Lectures, supra note 26, at 133.
244. Id.
245. Tucker, Examination, supra note 80, at 3. Tucker wrote the text before the decision in United States v. Worrall, 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766), which he discussed in a handwritten addendum to the pamphlet and added to Blackstone as a "Postscript." Tucker, Authority of English Common Law, supra note 57, ed. app. at 433-39.
early version of what became Note E of volume one of *Blackstone*. It is much different, however, and more importantly, it is largely a gloss on Article I and an attempt to use its provisions as illustrative of the terms of the confederating pact between the states, much as if it were a treaty among them. In this sense, he was harking back to Jefferson's proposal of 1785 by which the jurisdiction of the particular states is superseded as far—and only as far—as the express articles of a treaty.246 Tucker, in fact, cited Vattel in his examination, quoting his remarks on the way sovereign states retain their sovereignty "though they may in certain respects put some constraints on the exercise of it, in virtue of voluntary engagements."247

But Tucker was arguing more in order to grant the federal government less. Once again, context is essential, namely, the taught tradition of common law jurisprudence. His purpose in his examination was to refute any claim of a general common law authority in the federal government, and his strategy was to demonstrate that the enumerated powers of Article I, including the "necessary and proper" clause, were "special" grants.248 The Constitution made "some few cases, particularly enumerated,"249 that some jurists might improperly cite to suggest common law authority. Consolidationist Federalists, he insisted, must not be allowed to establish a basis for a general common law by using scattered, discrete common law powers that might collectively suggest the kind of "general theory"250 that Tucker fought so vigilantly to prevent. He pointed out, for example, that federal bankruptcy authority would not import the common law, because "[t]his [was] no part of the common law of England" but was, rather, a "grant of a special authority."251 Counterfeiting, though treason at common law, was not so under Article I.252 Such an argument had special urgency for Tucker within the context of common law jurisprudence, in which judges adhered to the traditional idea that

246. See supra text accompanying note 156.
247. TUCKER, EXAMINATION, supra note 245, at 28.
248. See id. at 29.
249. Id.
250. Id. at 31.
251. Id. at 29.
252. Id.
the common law had an independent existence that they might discover or use as a general background for interpretation.

When he published the substance of his examination as Note E to volume one of *Blackstone*, Tucker took pains to refute the idea that "there are certain passages in the constitution, and the amendments thereto, ... which perhaps may be relied on to establish this doctrine of a grant of general jurisdiction to the federal courts or government, in cases of common law, by implication." He noted that "we may be told, the common law is evidently referred to as the *law* of the *land*. This is not the case ...." It is precisely the same argument, using the same strategy, applied by Thomas Jefferson in his bitter attack on the incorporation of Christianity into the common law, and we must not overlook the way a lawyer taught in the common law tradition would recognize the entering wedge of common law reasoning.

Not surprisingly, Tucker emphasized economic functions in his invocation of Montesquieu and used them to justify the breadth of enumerated powers granted by Article I. For example, bankruptcy legislation offered an enumerated federal authority open to dispute because the constitutional language did not expressly extend this authority to "cases arising between Citizen and Citizen of the same State" and drew Congress into an area where "their power [did] not extend," namely, "the internal or domestic Commerce of the State." In a noteworthy concession to the necessity of federal jurisdiction over such internal state matters, however, he explained:

> Yet, on the other hand it may with great strength of reasoning be insisted, that here is a Special Case in which the power of the

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254. Id.
255. *Cf.* THOMAS JEFFERSON, *Whether Christianity Is a Part of the Common Law?*, in REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA, FROM 1730, TO 1740; AND FROM 1768, TO 1772, app. at 137, 138 (Hein 1981) (1829). Just as Tucker's examination listed powers allegedly proving common law authority, Jefferson's essay listed powers that jurists used to argue the general legal authority of Christianity. Jefferson insisted that jurists "could not introduce any such general position." *Id.* Compare *id.* at 142 (describing inconsistencies with the laws of England and biblical rules to conclude Christianity is not part of English common law), with Tucker, *View of the Constitution*, supra note 10, ed. app. at 428-33 (explaining why constitutional language does not infer a federal common law by recounting inconsistencies between English and American law).
Moreover, because a bankruptcy act would help combat fraud for people moving property across state lines, the act "will probably be so salutary, that the expediency of this branch of powers of congress, will cease to be drawn into question." 258

Under the "feeble confederacy" that Tucker regarded government under the Articles of Confederation, 259 the Continental Congress bore the responsibilities of national government but lacked the powers to carry them out. One of the most obvious sources of the crisis was the Continental Congress's financial impotence. "How often were the sinews of government unstrung," Tucker asked in his law lectures, "how often were its operations stop'd in the most critical conjunctions; how few of them were carried into vigorous effect, from the Imbecility of the federal government, and the deranged State of the Finances of the Union?" 260 The Confederation's financial weakness, therefore, provided grounds for Tucker to forgo his otherwise intransigent opposition to federal criminal authority and to concede an implied Article III power of the federal courts over crimes "against the revenue laws of the U.S." 261 Of its power to tax, as well, Tucker had no doubt, and for this reason he asserted that the "power of taxation seems indispensably necessary to constitute an efficient government, and appears inseparable from the right of deciding upon any measure, which requires the aid of taxes, to carry it into effect." 262 Tucker thus believed that Congress had extensive powers of taxation, both exclusive and concurrent. But tax policy for the good of the whole inevitably had a disparate impact on the different economies of the Union. "Hence a considerable inequality already exists between the contributions from the

257. Id. at unnumbered p. facing p. 15.
259. Tucker, Law Lectures, supra note 26, at 86.
260. Id.
several states; this inequality daily increases," he pointed out, "and is indeed daily favoured, upon principles of national policy." 263

This inequality created an irresolvable dilemma for Tucker (though not, later, for John C. Calhoun): the power to tax was essential to the Union's survival, but it was as dangerous as it was necessary and constitutionally valid. Federal revenue raised from taxes "appears to be inseparable from the right of deciding upon the propriety of any measure," he lectured at The College of William and Mary, "which requires the aid of taxes to carry it into effect." 264

Referring to Congress's expansive, first enumerated power, he observed, "it would be difficult to prove that any part of the powers granted to Congress by this clause ought to have been altogether withheld," because it had been granted "as an ultimate provision in any possible Case." 265 All he could do was hope that it would be exercised responsibly by being "reserved for such Emergencies as may justify the temporary adoption of a lesser, to avoid a greater, and more permanent, Evil." 266 Indeed, his faith in the political redress of a dubious act was fulfilled when Jefferson's new administration repealed all internal taxes, 267 which—except for other emergencies—were not levied again until passage of the Sixteenth Amendment. Perhaps ironically, the Jeffersonian repeal of internal taxes was made possible only because of the huge increase in revenues from customs duties, owing to the success of federal trade and commerce authority.

Though the states had concurrent authority to tax, the potentially discriminatory nature of tax policy gave Tucker pause. Direct taxes, such as on land, were expressly controlled by the requirement that they be apportioned according to the populations of each state. What alarmed Tucker were "indirect" taxes, those that need not be apportioned among the states according to population, and which might fall much more heavily on one group of states than another. Therefore, in his essay entitled View of the Constitution of the United States, he devoted an unusual amount of space to the problem. "The inequality of indirect taxes, among states, as well

263. Id. ed. app. at 238.
264. Tucker, Law Lectures, supra note 26, at 85.
265. Id. at 101.
266. Id.
as among individuals, is perfectly unavoidable,” he observed.\textsuperscript{268} Although he conceded that such taxes were constitutional, he feared they could upset the balance and cooperation of regions if a combination of states wished to shift their burdens to another. As a result, he warned of the possibility of further tax inequality: “It may in time become so great as to shift all the burthens of government from a part of the states, and to impose them, exclusively, on the rest of the union.”\textsuperscript{269} Already, “the northern states” were capitalizing on their ability to manufacture their own goods, which were not taxed, whereas other states that did little or no manufacturing were paying “heavy duties” on imports.\textsuperscript{270}

VI. POLITICAL AND JUDICIAL RESISTANCE TO FEDERAL ABUSES

Tucker's conciliatory temperament and his constitutional commitment to union forced him to swallow and accept the Supreme Court's decision in \textit{Hylton v. United States}, which held that the federal carriage tax was constitutional as indirect taxation, and thus nonapportioned.\textsuperscript{271} Tucker disagreed emphatically and joined many eminent Virginia jurists in refusing to pay the tax until the Supreme Court had made its decision.\textsuperscript{272} Nevertheless, pay it he did, along with the other protesters, once it had been "judicially determined";\textsuperscript{273} his own contrary "reasoning upon this subject," he conceded in a footnote to his exposition on the difference between

\begin{footnotes}
\item[268] Tucker, \textit{View of the Constitution}, supra note 10, ed. app. at 238.
\item[269] Id.
\item[270] Id.
\item[271] \textit{Hylton v. United States}, 3 U.S. (3 Dall.) 171, 183 (1796).
\item[272] Tucker's participation had been overlooked by a misreading of his unsigned letter to “Citizen Monroe, Minister Plenipotentiary from the United States of America, at Paris,” because the writing disguised his identity. See Unsigned Letter from St. George Tucker to James Monroe (Mar. 8, 1795) (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary); see also JULIUS GOEBEL, JR., 1 \textit{HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801}, at 779 & n.59 (1971). Tucker also did not identify himself in \textit{Blackstone} when mentioning the episode. Tucker, \textit{View of the Constitution}, supra note 10, ed. app. at 294 & n.*. For another indication of Tucker's participation as a tax resister in this episode, see Letter from John Page to St. George Tucker (June 28, 1794) (unpublished Tucker-Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary).
\item[273] Tucker, \textit{View of the Constitution}, supra note 10, ed. app. at 294 & n.*.
\end{footnotes}
direct and indirect taxes, "must therefore be regarded by the student as merely hypothetical, and speculative."\(^{274}\)

Preferring political accommodation in the interest of the Union as preferable to endangering the Union, Tucker urged consideration of judicial review, recourse to the ballot box, and the amending process as responses to the abuse of federal authority. "Until, therefore, the people of the United States, whether the present, or future generation, shall think it necessary to alter, or revoke the present constitution of the United States, it must be received, respected, and obeyed among us, as the ... supreme law of the land."\(^{275}\) Because his compact theory of retained state sovereignty allowed him to entrust the federal government with the regulation of trade and the power to tax, he had to concede the legitimacy of what it was doing in spite of its broad application. He had no other solution, and he urged his readers, in considering such a dilemma over duties and imposts, to work to confine their application to exceptional necessities and crises. "This great primary question being once decided in the affirmative," he wrote of the power of Congress to levy duties and imposts,

> it might be difficult to prove that any part of the powers granted to congress in this clause, ought to have been altogether withheld: yet being granted, rather as an ultimate provision in any possible case of emergency, than as a means of ordinary revenue, it is to be wished that the exercise of powers, either oppressive in their operation, or inconsistent with the genius of the people, or irreconcilable to their prejudices, might be reserved for cogent occasions, which might justify the temporary recourse to a lesser evil, as the means of avoiding one more permanent, and of great magnitude. \(^{276}\)

Tucker maintained his conciliating faith in political and judicial efforts to ward off constitutional conflict, and by the time his edition of *Blackstone* went to press, he was able to confirm his faith in such efforts, inserting a footnote reporting the repeal of such taxes.\(^{277}\)

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274. *Id.* ed. app. at 134 n.†.
275. *Id.* ed. app. at 173.
276. *Id.* ed. app. at 246.
277. *Id.* ed. app. at 246 n.* ("It seems to have been upon this principle that all the internal taxes (except that arising from the post-office,) were repealed ....").
Tucker's understanding of "necessary and proper" federal powers provides another example of his aversion to confrontation and his preference for established constitutional mechanisms. In his law lectures, in which he more candidly discussed the nuances of constitutional theory and the realities of politics, he "finished [his] summary view of the legislative powers granted to the federal government" by explaining that "great and extensive as they must appear they are in general such as could not well be dispensed with, in a government organized as that is; and in most instances they are guarded by wise provisions & restraints." Although such "parchment chains are not always sufficient" to check abuses of power, they did have a "salutary effect, that when broken they shew the people it is time to extirpate a Monster whom they have in vain attempted to bind." What did Tucker mean by "extirpate"? Neither individuals nor officials were obliged to obey unconstitutional laws, and for this reason he had withheld payment of the carriage tax until it was "judicially determined." The Necessary and Proper Clause was not a blank check to Congress, and any act exceeding congressional authority would be subject to "judicial cognizance and control."

Tucker, therefore, stopped short of the position taken by later states' rights advocates, and Tucker accepted the oppression of taxes judicially determined constitutional as "a lesser evil" than the alternatives. His compact theory of state sovereignty did not include an individual state's right to nullify federal law and he expressly admitted that "the states possess no constitutional negative upon the proceedings of the congress of the United States." Instead, the states were to have recourse to the amending process, of whose "utility and practicability ... we have already had most satisfactory experience." Although Tucker believed that each state in theory retained its sovereignty individually, he did not champion the right of an individual state acting on its own to defy or nullify federal

278. Tucker, Law Lectures, supra note 26, at 135.
279. Id.
280. See supra notes 271-74 and accompanying text.
282. Id. ed. app. at 314.
283. Id. ed. app. at 371.
Even so, concurrent taxing authority might allow Congress, “like Aaron’s rod, [to] swallow up” state taxing power, but he placed his hope on the biennial election of Congress to “strike at the root of the Evil.” Only if that were to fail would he accept a more serious response—that “the people must resort to first principles” and dissolve the Union.

And yet Tucker’s position on secession was profoundly ambivalent. Oft cited are his remarks in Of the Several Forms of Government, in which he described the states that replaced the confederation with the Constitution as “seceding states, as they may be not improperly termed.” Their right to do the same again, he maintained, had “not been diminished,” leaving “each state possessing the same right of withdrawing itself from the confederacy without the consent of the rest, as any number of them do, or ever did, possess.” Significantly, he placed this discussion in the more theoretically framed essay Of the Several Forms of Government, rather than in his more substantive and specific View of the Constitution of the United States. In the latter essay, when dealing with the actual mechanisms of government, he chose to emphasize his preference for use of the amending process, which was not the slow and cumbersome process that it later became. He did so by posing a hypothetical question for his readers.

If it be asked, what would be the consequences in case the federal government should exercise powers not warranted by the constitution, the answer seems to be, that where the act of

284. That is, Tucker was closer to Madison’s position in the Virginia Resolutions than to Jefferson’s Kentucky Resolutions, in which Jefferson stated that “each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.” THOMAS JEFFERSON, Draft of the Kentucky Resolutions (Oct. 1798), in THOMAS JEFFERSON: WRITINGS 449 (Merrill D. Peterson ed., 1984). Tucker, by contrast, did not cite the Kentucky Resolutions in Blackstone but chose to refer to the Virginia Resolutions. Tucker, View of the Constitution, supra note 10, ed. app. at 315 n.*. Scholars who lump these two resolutions together as an undifferentiated manifesto known as “the Virginia and Kentucky Resolutions” seriously err. Worthy of note, too, is Don Fehrenbacher’s observation that “Jefferson and Madison wrote with the purpose, not of inciting resistance to the central government, but of winning control of that government.” DON E. FEHRENBACKER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 41-42 (1989).

286. Id. at 94.
287. Tucker, Several Forms of Government, supra note 95, ed. app. at 73.
288. Id. ed. app. at 74-75.
usurpation may immediately affect an individual, the remedy is to be sought by recourse to that judiciary, to which the cognizance of the case properly belongs. Where it may affect a state, the state legislature, whose rights will be invaded by every such act, will be ready to mark the innovation and sound the alarm to the people: and thereby either effect a change in the federal representation, or procure in the mode prescribed by the constitution, further "declaratory and restrictive clauses", by way of amendment thereto.\footnote{289}

This actual problem had occurred, he noted by way of illustration, when a state was sued by a citizen of another state, and led promptly to ratification of the Eleventh Amendment.\footnote{290}

Many times in his essay on the federal constitution Tucker reiterated his preference for amendments, which he called "a safe, and peaceable remedy for its own defects, as they may from time to time be discovered,"\footnote{291} and which he relied on to prevent a constitutional calamity. Other countries, lacking such amending provisions, were wracked by violence: "A change of government in other countries is almost always attended with convulsions which threaten its entire dissolution; and with scenes of horror, which deter mankind from any attempt to correct abuses, or remove oppressions until they have become altogether intolerable."\footnote{292} Anyone who "first espies any defect, or decay, in the fabric" must resort to the amending process.\footnote{293} When citing the Virginia Resolutions, Tucker called on the states "to interpose" to halt abuses through the amending process.\footnote{294} Tucker praised this protection as providing change "without hazarding a dissolution of the confederacy, or suspending the operations of the existing government," and, moreover, without depending on Congress to initiate the process: Article V "secures to the states an influence in case congress should

\footnotesize{\begin{itemize}
\item \textsuperscript{289} Tucker, \textit{View of the Constitution}, supra note 10, ed. app. at 153 (footnote omitted). The omitted footnote cites \textit{The Federalist} for support that states must "sound the alarm to the people" when states' rights are invaded by federal abuses. Not all editions of Tucker's essays include this citation. See, \textit{e.g.}, Wilson, supra note 125, at 103. The omission adds to the misperception of Tucker's constitutionalism.
\item \textsuperscript{290} Tucker, \textit{View of the Constitution}, supra note 10, ed. app. at 153.
\item \textsuperscript{291} Id. ed. app. at 371.
\item \textsuperscript{292} Id. ed. app. at 371-72.
\item \textsuperscript{293} Id. ed. app. at 376.
\item \textsuperscript{294} Id. ed. app. at 315.
\end{itemize}}
neglect to recommend such amendments.” Those who frustrate the process, he warned, “are the real enemies of the constitution,” as Patrick Henry observed at the Richmond Convention when he accused die-hard opponents of ratification of refusing to accede to the proposal of amendments. If they truly sought a free and secure Union, Henry asked, “why do they not join us, and ask, in a manly, firm, and resolute manner, for these amendments?”

This tradition continued among the Revolutionary generation in Virginia, and Tucker appealed to the amending process pseudonymously in the crisis over Jay’s Treaty, which he assailed as “destructive to the prosperity, security, and independence of the United States; and subversive of the CONSTITUTION.”

Conceding the necessity and power of federal commercial regulation, Tucker advocated reconsideration of an amendment proposed by North Carolina in 1787 requiring two-thirds of the Senate to ratify commercial treaties and three-fourths of both houses for treaties “ceding, contracting, or suspending the territorial rights or claims of the United States or any of them ... or navigating the American rivers.” Dissolution was thus only a last, and dreaded, resort. As he told his law students,

[e]ach [state] is still a perfect State, still sovereign, still independent, and still capable should the occasion require to resume the exercise of its functions, as such, in the most unlimited extent.

But until the time shall arrive when the occasion requires a resumption of the Rights of Sovereignty by the several states (and far be that period removed when it shall happen) the exercise of the rights of sovereignty by the States individually, is wholly suspended or discontinued, in the Cases before mentioned: nor can that suspension ever be removed, so long as the present Constitution remains unchanged, but by the

295. Id. ed. app. at 371.
296. Id. ed. app. at 376.
299. Id. at 36.
Dissolution of the Bonds of the Union. An Event which no good Citizen can wish, & which no good, or wise Administration will ever hazard.  

Tucker thus should be grouped with other Virginians who feared consolidation but who strove to conciliate sectional differences in the vital interest of union, without which liberty could not survive. Edmund Randolph, Tucker's friend and colleague who also wavered in his willingness to support ratification, is an appropriate example. Although Randolph had withheld his signature from the Constitution at Philadelphia, he confessed that he had done so despite his realization that "[t]wo or more confederacies cannot but be competitors for power. The ancient friendship between the citizens of America, being thus cut off," he predicted, "bitterness and hostility will succeed in its place" and produce something "near to a military government." Randolph eventually reversed himself and gave his approval at Richmond. In doing so, he reflected proudly on his being "a witness to this business from its earliest beginning" by being "honored with a seat in the small Convention held at Annapolis"—as had Tucker. Like Tucker, Randolph saw union as the great priority, and he confessed, "I will assent to the lopping of this limb (meaning his arm) before I assent to the dissolution of the Union." Expressing his faith in the amending process and acknowledging that eight states already had ratified, he asserted, "I am a friend to the Union" and chose to ratify. The choice, he later explained, was the single question of "Union or no Union." Tucker, who began the ratification debate as an ardent opponent, also seems to have come around to supporting, or at least acquiescing in, ratification. As the "anti constitutional Fever which raged

300. Tucker, Law Lectures, supra note 26, at 19.
301. Letter by Edmund Randolph (Dec. 27, 1787), in 1 DEBATE ON THE CONSTITUTION, supra note 46, at 595, 605.
302. Address of Governor Edmund Randolph, Virginia Ratifying Convention (June 4, 1788), in 2 DEBATE ON THE CONSTITUTION, supra note 46, at 598, 601.
303. Id. at 600 (parenthetical by editors).
304. Id. at 604.
305. Remarks of Governor Edmund Randolph, Virginia Ratifying Convention, in STATE RATIFICATION DEBATES, supra note 45, at 652, 652.
here some time ago begins to abate,” reported a friend of his, “I am told St. G[eorge] Tucker has confessed his sins.”

Tucker never addressed the precise mechanism for such a dissolution, which would have to occur in defiance of any express constitutional provision. In his law lectures, he even provided a broad interpretation of Article IV, Section 3, which granted Congress “the power of admitting new States into the Union.” According to Tucker, “[t]he Article seems also to have been intended to guard ag[ainst] any separation of the States by a partial confederation.” In the long run, he hoped, what the South as a region lost by virtue of its membership in the Union might be outweighed by what it gained. “The possibility of an undue partiality in the federal government in affording it’s [sic] protection to one part of the union in preference to another, which may be invaded at the same time,” he wrote in discussing the Guarantee Clause, “seems to be provided against, by that part of this clause which guarantees such protection to each of them.”

In a remarkable comment made in his essay Of the Constitution of Virginia, Tucker lamented the vulnerability of the commonwealth “in times of war or difficulty” and reflected on the security afforded by membership in a union capable of defending its citizens—a security that would be lost on dissolution.

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306. Letter from Archibald Stuart to James Madison (Jan. 14, 1788), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, supra note 100, at 302. Ironically, one of the Chesterfield County delegates chosen instead of Tucker to go to the Richmond Convention as an Anti-Federalist also changed his mind and voted to ratify. Id. at 361 n.; see supra note 100.

307. Tucker, Law Lectures, supra note 26, at 150.

308. Id. To support this position, he had the authority of Vattel, who discussed a sovereign's right of "dismembering of the nation or state itself." VATTEL, supra note 29, bk. I, § 263. Vattel concluded "the cession of a town or province ... must ever result from invariable principles. A nation ought to preserve itself ..., it ought to preserve all its members, it cannot abandon them, and it is under an obligation to them of maintaining them in the rank of members of the nation ...." Id.

In making this statement, Tucker was expanding on a point for his law students that he omitted from his published statement in Blackstone, thus complicating his reputation as a secessionist and calling into question his own statements on dissolution. See Tucker, Several Forms of Government, supra note 95, ed. app. at 73-75; supra notes 284-86 and accompanying text.


310. See St. George Tucker, Of the Constitution of Virginia, in 1 Tucker, Blackstone's Commentaries, supra note 6, ed. app. at 83.
It is also [a] matter of consolation, that even in such times, the powers vested in the federal government, may in great measure shelter us from the storms to which the very great defects in our state constitution must inevitably have exposed us, but for the many advantageous arrangements which have been made in the constitution of the United States. If by any fatal event the federal union should happen to be dissolved, or broken, there is not a state in the confederacy, that would sooner feel the total inadequacy of its constitution to support its liberty and independence, as a State, than Virginia.\(^\text{311}\)

Membership in the federal union, Tucker the Southerner recognized, was especially useful in providing "additional force to the aid of the state governments, in case of an internal rebellion or insurrection against it's [sic] authority."\(^\text{312}\) Tucker, of course, was alluding to slave rebellion when he conceded that, "[t]he southern states being more peculiarly open to danger from this quarter, ought to be particularly tenacious of a constitution from which they may derive such assistance in the most critical periods."\(^\text{313}\) This danger would loom far larger in later decades, as the federal government—controlled by regions hostile to slavery—seemed to move away from its commitment to encouraging and protecting regional differences. That Tucker's arguments were later enlisted in the ensuing constitutional battle and extended beyond what he had written in *Blackstone* in 1803 is another story. The "impact" one has on law is problematical, and sometimes far exceeds one's intent, hopes, or fears.

**CONCLUSION**

St. George Tucker argued for broad federal authority under Article I, Section 8, and Article IV, Section 3, cabined within the limits of commerce and the Constitution's other enumerated powers. Tucker firmly believed this authority was necessary for an expanding republic of distinct economic regions—North, South, East, and West. Illustrated by his essays on Blackstone and his lesser-known

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\(^{311}\) *Id.*

\(^{312}\) Tucker, *View of the Constitution*, supra note 10, ed. app. at 367.

\(^{313}\) *Id.*
law lectures and pseudonymous pamphlets, his position on broad federal economic power belies his reputation, formed a generation later, as a strict constructionist states' rights advocate. His political economy, largely drawn from Vattel, is the exception to the strict constructionist states' rights viewpoint. Because of St. George Tucker's stature as the first states' rights commentator on the Constitution, his discussions serve as a guide to understanding the limits of states' rights, the meaning of secession, and the purpose of the federal compact in the early republic. This Article places Tucker back in the context of his generation—the founding generation—and reveals a more nuanced, qualified, and at times ambivalent, constitutional thinker.

314. Cover, supra note 8, at 1488.